

83-317

Office-Supreme Court, U.S.
FILED

AUG 23 1983

ALEXANDER L. STEVAS,
CLERK

No. ...-....
IN THE
Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK, Sheriff of the County of Los Angeles,
et al.,

Petitioners,

vs.

DENNIS RUTHERFORD, HAROLD TAYLOR and RICHARD ORR,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT.**

DONALD K. BYRNE,
Chief Deputy County Counsel,
FREDERICK R. BENNETT,
Principal Deputy County Counsel,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1880,
Counsel for Petitioners.

Questions Presented.

1. Whether jail inmates have a constitutional right to contact visitation.
2. Whether jail inmates have a constitutional right to be present to observe and make inquiries during general searches of their cells?

Parties.

Petitioners herein are:

SHERMAN BLOCK, Sheriff of the County of Los Angeles, successor in office to Peter J. Pitchess, Appellant below; FRED E. STEMRICK, Assistant Sheriff, successor in office to William Anthony, Appellant below; JAMES W. PAINTER, Chief of the Los Angeles County Sheriff's Department Custody Division, successor in office to John Knox, Appellant below; RON BLACK, Captain Central Jail, successor in office to James White, Appellant below; EDWARD EDELMAN, KENNETH HAHN, and PETER SCHABARUM, Supervisors of the County of Los Angeles and Appellants below; DEANE DANA and MICHAEL D. ANTONOVICH, Supervisors of the County of Los Angeles, as successors in office to James Hayes and Baxter Ward, Appellants below.

Respondents herein are:

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	i
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	2
Reasons for Granting the Writ	5
1. The Decision Below Concerning Contact Visitation Raises a Significant and Recurring Issue Conflicting With the Decisions of Other Courts of Appeal, and Ripe for Review	5
2. The Decision Below Concerning Cell Searches Is in Conflict With an Applicable Decision of This Court	6
Conclusion	6

APPENDIX

1. Opinions of the Court of Appeals	App. p. 1
A. Opinion Filed July 14, 1983	1
Dissenting Opinion	15
B. Memorandum Opinion Filed August 8, 1980	17
2. Opinions and Judgment of the District Court	23
A. Memorandum Decision Filed May 18, 1981	23
B. Supplemental Memorandum Opinion and Judgment, Filed February 15, 1979	29
Judgment	37

	Page
C. Reported Memorandum Opinion, 457 F.Supp. 104 (C.D. Cal. 1978)	41
3. Constitutional and Statutory Provisions	67
United States Constitution, Amendment 14	67
United States Code, Title 28	67
United States Code, Title 42	68

TABLE OF AUTHORITIES

Cases	Page
Ahrens v. Thomas, 570 F.2d 286 (8th Cir. 1978)	6
Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)	3, 5, 6
Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978)	6
Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978)	6
Inmates of Allegheny Cnty Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979)	6
Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981), cert. granted sub nom., Ledbetter v. Jones, 452 U.S. 954, 101 S.Ct. 3106, 69 L.Ed.2d 970 (1981), cert. dism., 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981)	5, 6
Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980)	6
Marcera v. Chindlund, 595 F.2d 1231 (2d Cir. 1979), vacated sub nom., Lombard v. Marcera, 442 U.S. 915, 99 S.Ct. 2833, 61 L.Ed.2d 281 (1979)	5
Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975)	6
Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980)	6
Rutherford v. Pitchess, 457 F.Supp. 104 (C.D. Cal. 1978)	1, 2
West v. Infante, 707 F.2d 58 (2d Cir. 1983)	6

Constitutional Provisions

United States Constitution, Amendment 14, Section 1	2
--	---

Page

Rules

Federal Rules of Civil Procedure, Rule 53	5
---	---

Statutes

United States Code, Title 28, §1254(1)	1
United States Code, Title 28, §1343	2
United States Code, Title 28, §2201	2
United States Code, Title 28, §2202	2
United States Code, Title 42, §1983	2
United States Code, Title 42, §1985	2

No. ...-....
IN THE
Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK, Sheriff of the County of Los Angeles,
et al.,

Petitioners,

vs.

DENNIS RUTHERFORD, HAROLD TAYLOR and RICHARD ORR,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT.**

Opinions Below.

The opinion of the Court of Appeals, entered July 14, 1983, not yet reported, its earlier unreported memorandum opinion (filed August 8, 1980); and the unreported memorandum opinion (filed May 18, 1981), the unreported supplemental memorandum opinion (filed February 15, 1979), and the reported memorandum opinion (*Rutherford v. Pitchess*, 457 F.Supp. 104 (C.D. Cal. 1978)), of the District Court, appear in the appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 14, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions.

The following constitutional and statutory provisions appear in the appendix hereto:

United States Constitution, Amendment 14, Section 1.

United States Code, Title 28, Sections 1343, 2201, 2202.

United States Code, Title 42, Sections 1983, 1985.

Statement of the Case.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 14, 1983, affirming the orders of the District Court concerning Los Angeles County Central Jail (1) requiring pretrial inmates confined longer than 30 days and concerning whom there is no indication of drug or escape propensities, to be permitted one contact visit a week, up to a maximum of 1,500 such visits a week for all such inmates; and (2) requiring that available inmates be permitted to observe and make inquiries during general searches of their own cell areas.

The present action was filed alleging jurisdiction under 28 U.S.C. §1343 for a claim under 42 U.S.C. §§1983, 1985, and for injunctive and declaratory relief pursuant to 28 U.S.C. §§2201, 2202, as a class action challenging a wide range of conditions of confinement at the Los Angeles County Central Jail, a 5,000 man jail located in downtown Los Angeles, and used primarily for the housing of male inmates awaiting trial on criminal charges. After trial the District Court, in a reported decision (*Rutherford v. Pitchess, supra*), and an unreported supplemental memorandum opinion (filed February 15, 1981), ordered a number of changes in jail conditions. Petitioners appealed three of those orders, including the orders here involved. The orders are stayed pending appeal.

In an earlier unpublished memorandum decision (filed August 8, 1980), the Court of Appeal remanded these orders

to the District Court for reconsideration in light of the intervening decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

On remand, in an unreported memorandum opinion (filed May 18, 1981), the District Court acknowledged that *Wolfish* required some differences in analysis, but concluded that it required no difference in result, and reaffirmed its previous orders finding that the categorical rejection of contact visitation exceeded the reasonable requirements of security, and that the ordered search procedures were a necessary prophylactic against improper seizure of inmates' property.

Petitioners again appealed, and the Court of Appeal affirmed the orders with regard to contact visits and cell searches. Petitioners seek review of that judgment of affirmance.

The visitation procedures found constitutionally inadequate by the District Court, permitted daily unmonitored visits with adults and children 12 hours a day between the hours of 8:30 a.m. and 8:30 p.m. The number of such visits average over 2,000 a day, over 63,000 a month. (Admitted facts, CR 133, p. 14, excerpt 142). The visits are conducted in an area where visitors never enter the jail's security, and inmates and visitors are separated by glass and speak over power phones. No direct supervision or searches of visitors or inmates is done or required. Since visitors never enter the jail or come in contact with the inmates, the large number of visits can be accomplished with no prior appointments, screening, or approved visitor lists, and uninhibited by intrusive security measures. (Lonergan decl., CR 88, excerpt 122-125, admitted by stipulation, CR 145).

Under the search procedures found constitutionally inadequate by the Court, cell areas were searched while all

inmates were out of the cell areas for other activities such as meals, exercise, or the like. Under the ordered procedures, all inmates are to be removed to a separate day room area, and the available occupants of particular cells brought back to observe and make inquiries during the search of their particular cell.

REASONS FOR GRANTING THE WRIT.

1. **The Decision Below Concerning Contact Visitation Raises a Significant and Recurring Issue Conflicting With the Decisions of Other Courts of Appeal, and Ripe for Review.**

A right to contact visitation is regularly asserted in most prisoners' rights litigation. Contact visitation, which is understandably desirable to detainees, presents substantial security problems, opportunities for importation of contraband, and potential for violence and escape, with direct and serious consequences to jail staff, inmates, and the public.

This Court touched upon, but declined to decide the question in *Bell v. Wolfish*, *supra*, 441 U.S. 520, as the issue was not challenged in that appeal. However, this Court observed with regard to another issue, the validity of strip searches conducted to discourage smuggling of contraband during such visits, that the need for such searches could be obviated by abolishing contact visitation altogether. Thereafter, in another case, this Court reversed and remanded the issue of contact visitation for reconsideration by the Second Circuit in light of *Bell v. Wolfish*, *supra*. *Marcera v. Chindlund*, 595 F.2d 1231 (2d Cir. 1979), vacated, *Lombard v. Marcera*, 442 U.S. 915, 99 S.Ct. 2833, 61 L.Ed.2d 281 (1979).

The question of contact visitation appeared to be presented for resolution with the granting of certiorari on that issue in *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981), cert. granted sub nom., *Ledbetter v. Jones*, 452 U.S. 954, 101 S.Ct. 3106, 69 L.Ed.2d 970 (1981); however, the matter was dismissed pursuant to Rule 53. *Ledbetter v. Jones*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981).

The circuits that have considered the issue remain in apparent conflict, at least in terms of result reached, the

weight of authority being that contact visitation is not constitutionally required. *Feeley v. Sampson*, 570 F.2d 364, 373 (1st Cir. 1978); *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 757-761 (3d Cir. 1979); *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975); *Jordan v. Wolke*, 615 F.2d 749, 751 (7th Cir. 1980); *Ahrens v. Thomas*, 570 F.2d 286, 290 (8th Cir. 1978); *Ramos v. Lamm*, 639 F.2d 559, 580 (10th Cir. 1980). Cf. *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978); *West v. Infante*, 707 F.2d 58 (2d Cir. 1983); *Jones v. Diamond*, *supra*, 636 F.2d 1363, 1377 (5th Cir. 1981). The decision of the Ninth Circuit Court of Appeals is the only post-*Wolfish* Circuit Court of Appeals' decision, specifically requiring contact visitation at a particular facility.

2. The Decision Below Concerning Cell Searches Is in Conflict With an Applicable Decision of This Court.

The District Court's decision requiring that general cell searches be conducted in the presence of available inmate occupants as necessary to minimize the risks of improper confiscation of inmate possessions is in conflict with this Court's reversal of an order requiring similar search procedures in *Bell v. Wolfish*, *supra*, 441 U.S. at 455-457.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

DONALD K. BYRNE,

Chief Deputy County Counsel,

FREDERICK R. BENNETT,

Principal Deputy County Counsel,

Counsel for Petitioners.

APPENDIX.

1. Opinions of the Court of Appeals.

A. Opinion Filed July 14, 1983.

In the United States Court of Appeals for the Ninth Circuit.

Dennis Rutherford, et al., Plaintiffs-Appellees, v. Peter J. Pitchess, et al., Defendants-Appellants. No. 81-5461. D.C.# CV-75-4111-WPG.

OPINION.

Appeal from the United States District Court for the Central District of California. William P. Gray, District Judge, Presiding. Argued and submitted December 7, 1982.

Before: TANG, SCHROEDER, and POOLE, Circuit Judges. SCHROEDER, Circuit Judge:

This is a class action against Los Angeles County officials¹ on behalf of pretrial detainees in the Los Angeles County Central Jail. After trial the district court ordered twelve different changes in jail conditions. The county accepted nine of those changes which covered a variety of problems, including overcrowding, inadequate exercise, lack of clean clothing and telephone access, and insufficient time to eat meals. It appealed the remaining three.

In an earlier unpublished memorandum decision, we remanded the case to allow the district court to reconsider the three challenged orders in the light of the intervening Supreme Court decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979) (*Wolfish*). On remand, the district court acknowledged that *Wolfish* required some differences in

¹Named as defendants in this action are: Los Angeles County Sheriff Peter J. Pitchess; County Corrections Chief John Knox; Central Jail Commander James White; and Los Angeles County Supervisors Edward Edelman, Kenneth Hahn, James Hayes, Peter Schabarum, and Baxter Ward. We refer to these defendants collectively as "the county."

analysis, but concluded that it required no difference in result. The court reaffirmed its previous order with respect to all three conditions. The county again appeals.

The challenged orders, which have been stayed pending appeal, require that the jail administrators: (1) allow low-risk detainees who are imprisoned for more than one month to receive one contact visit per week, up to a maximum of 1,500 such visits per week; (2) permit inmates to observe searches of their cells; and (3) reinstall transparent windows in the cells.² We reverse the order requiring reinstallation of windows and affirm the other two.

I.

The Legal Standards

The district court's original orders were entered in 1979 after a seventeen-day court trial and two personal inspections of the jail. Judge Gray explained his rulings in two memoranda of decision, both of which reflected the court's consideration of relevant aspects of the detainees' confinement,

²The exact language of the challenged orders is as follows:

2.(b) *Contact Visits.* Commencing not more than ninety days following the date of this order, the defendants will make available a contact visit once each week to each pre-trial detainee that has been held in the jail for one month or more, and concerning whom there is no indication of drug or escape propensities; provided, however, that no more than fifteen hundred such visits need be allowed in any one week. In the event that the number of requested visits in any week exceeds fifteen hundred, or such higher number as the Sheriff voluntarily undertakes to accommodate, a reasonable system of rotation or other priorities may be maintained. The lengths of such visits shall remain in the discretion of the Sheriff.

5. *Restoration Of Windows.* Within ninety days following the filing of this order, transparent windows shall be restored in each portion of the jail from which they previously have been removed.

8. *Cell Searches.* Inmates that are in the general area when a 'shakedown' inspection of their cells is undertaken shall be permitted to be sufficiently proximate to their respective cells that they may observe the process and respond to such questions or make such requests as circumstances may indicate.

including whether the challenged restrictions were reasonably necessary to the maintenance of security, order, and safety in the institution.

In our decision remanding the case in light of *Wolfish*, we summarized the standards which the district court should apply:

Bell v. Wolfish, 441 U.S. 520 (1979), . . . set forth two tests for evaluating constitutional attacks by pre-trial detainees on conditions and restrictions during their confinement. Where a condition implicates the fourteenth amendment's protection against deprivation of liberty without due process, the proper inquiry is whether the condition amounts to punishment. *Id.* at 538. A condition is punitive if there is a showing of express intent to punish. Otherwise, if a particular condition is reasonably related to a legitimate nonpunitive objective, it does not, without more, amount to punishment. *Id.* Legitimate objectives include both insuring the detainee's presence at trial and facilitating the effective management of the facility. *Id.* at 539-40.

Where a restriction implicates another constitutional right as well, a court must assess whether the condition or restriction impermissibly infringes that right. In making that assessment, however, the court must recognize that the essential goals of maintaining security and preserving internal order and discipline may require some limitation on the constitutional rights of detainees, *id.* at 546, and must grant wide-ranging deference to prison administrators in the adoption of policies to serve these goals. *Id.* at 547-58.

Rutherford v. Pitchess, Nos. 79-3061/79-3367, slip op. at 2-3 (9th Cir. Aug. 8, 1980) (mem.). We commented upon the relationship between the analysis used by the district court in this case and the Supreme Court in *Wolfish* as follows:

The district court here articulated standards that track closely those the Supreme Court subsequently laid down in *Wolfish*. Relying on case law to the date of its decision, however, the district court also observed that proof of the availability of less restrictive means demonstrated that prison officials had exaggerated their response to security concerns. *Wolfish* rejected this mode of analysis. *Id.*

Id. at 3. On remand, Judge Gray reaffirmed his prior orders, stating that the county's actions "exceeded the reasonable requirements of security."

We review the district court's decision upon remand in light of the controlling authority and our earlier mandate. In doing so, we recognize that the authority to make policy choices concerning prisons is not a proper judicial function. *Wolfish, supra*, 441 U.S. at 562, 99 S. Ct. at 1886. Nevertheless, we also are conscious of the fact that pre-trial detainees, who have not been convicted of any crime, retain important constitutional rights which must be protected.

A court confronted with challenges to prison practices therefore faces an important and difficult task. To fulfill the Supreme Court's mandate under *Wolfish*, it must explore and analyze two oftentimes competing sets of needs and objectives — the penal institution's interest in institutional administration and security and the detainee's interest in protecting and exercising his retained constitutional rights. Only after such a thorough review can a court decide whether or not a particular prison condition is an unreasonable, exaggerated response to the legitimate nonpunitive objectives of a detention facility.

Here, the trial court's factual findings are for the most part not challenged by the county and we defer to those findings as they have not been shown to be clearly erroneous. Fed. R. Civ. P. 52(a). The county assails the court's

application of the appi —5—

ditions existing at the appropriate legal standards to the con-
of course, subject to de prison. These legal conclusions are,
F.2d 1237, 1245 (9th C. novo review. *Hoptowit v. Ray*, 682
challenged order. Cir. 1982). We consider, in turn, each

II.

The district court for *Contact Visits*
ees the opportunity for and that the county denies all detain-
The inmates are separat physical contact with their visitors.
glass and must use a "ted from their visitors by transparent
In considering the telephone" for voice communication.
the district court rejecte ppellees' challenge to this practice,
tact visits should be Pd any contention that unlimited con-
were permitted in all v. provided, concluding that if contact
would result and the to visits, an enormous security burden
ical limitations of L. A tal number of visits, given the phys-
duced. At the same tim. County Jail, would have to be re-
adverse psychological ne, the court was concerned with the
contact with family meffects caused by the lack of physical
time. Such effects are embers over a prolonged period of
record and have been supported by the evidence in this
fronting similar challer noted by other district courts con-
371 F. Supp. 594, 601-nges. See, e.g., *Rhem v. Malcolm*,
(2d Cir. 1974). 07 (S.D. N.Y.), *aff d*, 507 F.2d 333

The court carefully re
lems that contact visit reviewed the particular security prob-
of physical harm and eation engenders, including the risks
of contraband such as d escape, as well as of the importation
the short length of tim rugs and weapons. It also considered
particular facility. Afte that most detainees spend at this
concluded that the loss er this thorough analysis, the court
was an unreasonable an of contact over a prolonged period
d exaggerated response by the county

for those detainees who spend more than thirty days in the facility and who can be identified as low-risk detainees. The court therefore entered a narrow order providing for one contact visit per week for such detainees and for a maximum number of contact visits per week in the institution. The court found that only modest physical alterations would be necessary to permit this small number of visits.³

The county argues in this appeal that the contact visitation order is improper because the district court relied on evidence of visitation practices in other county institutions in order to arrive at a "lowest common denominator." The Supreme Court in *Wolfish* stated that the Due Process clause does not require such a security standard, "whereby a practice permitted at one penal institution must be permitted at all institutions." 441 U.S. at 554, 99 S. Ct. at 1882.

Our review of the district court's opinion, however, convinces us that Judge Gray fashioned a narrowly drawn order based upon the capacities, limitations, and security risks of this particular jail. In reaffirming his order on remand, Judge Gray noted that he had tried "to find the 'mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general application,' to which Justice Rehnquist referred in his opinion (441 U.S. at 546)." He concluded that the "categorical rejection of all proposals involving [contact] visits" is not consistent with this approach. We agree with Judge Gray in this regard.

The district court's analysis in this case is fully consistent with the approach approved by the Fifth Circuit in *Jones v. Diamond*, 636 F.2d 1364, 1377-78 (5th Cir.) (en banc), cert. dismissed, 453 U.S. 950, 102 S. Ct. 27 (1981). In

³The maximum number of contact visits was set at 1,500. By contrast, the total number of visitors at Central Jail per week exceeds 15,000.

Diamond the Fifth Circuit held that the determination of whether contact visitation may be denied for legitimate security reasons is a decision peculiar to each penal institution: "Whether or not contact visitation rights should be accorded pretrial detainees in the Jackson County jail can be decided only after a full hearing on the facilities available in both jails and the security requirements in each." 636 F.2d at 1377.

Nor is affirmance of the district court's order in conflict with other post-*Wolfish* circuit opinions which have disapproved of increased contact visitation. For example, in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S. Ct. 1759 (1981), the court of appeals refused to approve a district court decision ordering unrestricted contact visitation. However, the pre-existing prison facility policy in that case permitted even more liberal contact visitation than the order on review here; all inmates were allowed to kiss their visitors at the beginning and end of each visit, hold hands, and hold small children on their laps. The court of appeals deferred to this existing policy because "it is a reasonable response to the legitimate concerns of prison security." 639 F.2d at 580.

In *Jordan v. Wolke*, 615 F.2d 749 (7th Cir. 1980), the court also refused to enforce a district court order requiring unrestricted contact visitation for all detainees. The court noted that only five percent of the detainees stayed in the facility for over thirty days, implicitly recognizing that different considerations may apply when courts consider requiring contact visits for long-term as opposed to short-term detainees. See also 1979 B.Y.U. L.Rev. 1022, 1034-35. Here, the record reflects that the percentage of long-term detainees in L.A. County Jail is considerably higher.

In *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754 (3d Cir. 1979), the court of appeals affirmed the district

court's ruling that contact visitation could be prohibited. The district court's findings, which were held not to have been clearly erroneous, were based on the conditions and security problems existing at that particular institution.

The twin threads running through all these post-*Wolfish* cases are first, that contact visitation is not constitutionally mandated for all detainees in all facilities; and second, that the denial of all contact visitation is not per se beyond court scrutiny. The pattern which emerges is one which recognizes the important security interests of the institution but at the same time recognizes the psychological and punitive effects which the prolonged loss of contact visitation has upon detainees, who have not as yet been convicted of any crime. The institution's security interests do not always predominate. A blanket restriction on contact visits for all detainees may present an unreasonable, exaggerated response to security concerns at a particular facility. The district court's order here, granting a limited number of contact visits for only those who have been held more than thirty days and who do not constitute security risks, fits harmoniously within this pattern. We therefore affirm that order.

III

Observation of Cell Searches

The second challenged jail practice is that of conducting unannounced "shakedown" searches of cells outside the presence of the inmates. The need for such searches themselves is not at issue, only the need for conducting them in a manner which prevents the prisoner from observing the search.⁴ The district court's order requires that individual

⁴Appellees concede that such searches are necessary to prevent the accumulation of contraband and other items not allowed in the cells, such as food or excessive clothing and reading material, and to maintain the security of the facility.

inmates in the general area of their cells when a "shake-down" search occurs should be "near enough to observe the process and raise or answer any relevant inquiry."

Before entering this order, Judge Gray visited the prison and personally observed four alternative methods of conducting cell searches. As with the order regarding contact visits, Judge Gray carefully took into account the conditions at the facility and the security concerns expressed by prison officials, including the possibility that the prisoner's presence would disrupt the search or, more important, would frustrate it by disclosing safe hiding places. He also considered the county's further argument that confrontation during searches would create security risks too costly to deal with.

In support of the plaintiffs, Judge Gray considered testimony and observed first-hand that the county's method of searching all the cells in a row while the inmates were contained in a day room, or elsewhere, presents its own risks. For example, prison officials may improperly confiscate the prisoner's meager possessions. The prisoners also objected that this practice encouraged officials to "tear their cells apart."

In analyzing the prison's procedure, Judge Gray recognized the competing needs and objectives of the parties, and therefore stated in his opinion that his order only required that individual inmates be brought to the cell area one at a time to observe the search of their respective cells. This procedure was designed to meet the plaintiffs' concerns and avoid confrontation and additional expense.

The county argues in this appeal, however, that the Supreme Court's decision in *Wolfish* forecloses any order which allows pre-trial detainees to observe cell searches because, in the county's view, *Wolfish* held that the practice of con-

ducting searches outside of a detainee's presence is, in every instance, rationally related to legitimate security concerns. We disagree. While the court in *Wolfish* did reverse an order permitting inmates to observe shakedown searches of their cells, it did so because it concluded that a rule preventing observation does not, in itself, render a search "unreasonable" under the fourth amendment. 441 U.S. at 557, 99 S. Ct. at 1883-84. In our view this holding does not preclude an observation order based on the circumstances and evidence present here; there are significant differences between this case and *Wolfish*.

The challenged district court order in *Wolfish*, for example, failed to take into account the concerns of prison officials that inmates could frustrate searches by "distracting personnel and moving contraband from one room to another ahead of the search team." 441 U.S. at 555, 99 S. Ct. at 1883. Here, by contrast, these concerns were clearly addressed by Judge Gray and taken into account in framing the cell search order. The order approves of the unannounced removal of inmates from their cells and their detention in the day room while the cell row is being searched. Individual detainees need only be brought back from the day room to observe the search of their own cell.

Another significant difference is that the lower court in *Wolfish* had taken the position that the searches infringed the detainees' interest in privacy and were "unreasonable" within the meaning of the fourth amendment. The Supreme Court sharply criticized this holding, stating that "[p]ermitting detainees to observe the searches does not lessen the invasion of their privacy. . . ." 441 U.S. at 557, 99 S. Ct. at 1883. Here, however, in considering the Supreme Court's opinion in *Wolfish*, the district court emphasized that its order was not based solely upon fourth amendment concerns, but was, to a large extent, also based

upon the protection of the inmates' right to due process of law under the fourteenth amendment. Judge Gray found, given all of the evidence before him, including his own observations in the prison, that the risks of improper confiscation of a detainee's few cherished possessions were great and could not be redressed in any action to recover the value of the articles taken.

The district court specifically referred to one incident which was significant to its conclusion that improper deprivations could only be avoided by injunctive relief. During the demonstration of one of the alternative methods of search conducted during the district court's visit, the deputy conducting the search started to confiscate a prisoner's magazines. Since in this alternative the prisoner was permitted to observe the search, he was able to explain to the deputy that the two magazines did not violate prison regulations on the currency and condition of magazines. Hence observation prevented the taking and destruction of materials valuable to a prisoner. As the district court observed: "[t]hese are small matters; but they are important to the detainees." Thus, Judge Gray concluded that "to allow these prized possessions to be confiscated under subjectively enforced regulations, without giving the possessor any opportunity to explain or protest or entreat, deprives him of his property without due process of law."

Nevertheless, the county still suggests that the district court's order cannot stand because, as a matter of law, language in a footnote of the *Wolfish* opinion prevents courts from examining the effect of search practices on property

rights of inmates. See 441 U.S. at 558 n.38, 99 S. Ct. at 1884.³

In our view the *Wolfish* footnote does not preclude such considerations; the lower courts in *Wolfish* had not even considered possible violations of property rights. The Court in this footnote merely points out that, even assuming that searches violate prisoner property rights, a wholesale challenge to a prison search policy must still be analyzed with reference to jail officials' concerns and judgments on security matters. The record in this case clearly reflects that Judge Gray, in fashioning his order modifying jail search practices, paid ample deference to the jail officials' concerns about security problems. We therefore uphold Judge Gray's order with respect to cell search procedures.

IV

Restoration of Windows

The last challenged order is Judge Gray's requirement that the county reinstall transparent windows in those portions of the jail which originally had such windows. Shortly after L.A. County Jail was constructed, the original windows, made of wired glass, were replaced. Eventually, currently existing concrete enclosures were put in to cover the openings. It is undisputed that these changes were brought

³The complete text of footnote 38 is as follows:

It may be that some guards have abused the trust reposed in them by failing to treat the personal possessions of inmates with appropriate respect. But, even assuming that in some instances these abuses of trust reached the level of constitutional violations, this is not an action to recover damages for damage to or destruction of particular items of property. This is a challenge to the room-search rule in its entirety, and the lower courts have enjoined enforcement of the practice itself. When analyzed in this context, proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S., at 128, 97 S. Ct., at 2539.

about by the fact that many of the glass windows were broken by the inmates and thus seriously interfered with security at the facility. The county considered installing other transparent materials, but these were disapproved by the fire department due to fire hazard regulations.

Plaintiffs argue that they have a psychological need for exposure to the outside world and that the lack of windows along with other conditions at the jail, including inadequate rooftop exercise time, overcrowding, and the lack of indoor recreational facilities, coalesced to create a punitive atmosphere violative of due process. They allege that Judge Gray's order to restore the windows is designed, in part, to compensate for his refusal to issue comprehensive orders regarding other aspects of the jail's conditions.

Judge Gray's order was based on the ground that "the [inmates'] right not to be deprived of all view of the outside world far outweighs the inferred danger of serious escape attempts or contraband importation. . . ." This conclusion was premised on his opinion that, given the physical layout of the jail and windows, and the intense supervision provided, the possibility of escape was remote and prison officials could use their "resourcefulness" to prevent contraband importation. Judge Gray also was not convinced that the county had made a complete search for transparent plastic windows that would comply with fire safety standards. On remand, Judge Gray likened the lack of windows to "loading a detainee with chains and shackles and throwing him in a dungeon. . . ." See *Wolfish, supra*, 441 U.S. at 539 n.20, 99 S. Ct. at 1874. Although he did not find any express intent to punish, he concluded, in effect, that such an intent could be inferred.

The difficulty with Judge Gray's order and his explicative reasoning is that it fails to account for the jail's history of very real and serious security problems with respect to win-

dows, a history which is not challenged by the appellees. Uncontroverted evidence shows that every measure attempted prior to the installation of the concrete enclosures proved unsatisfactory. When the broken wired glass windows were replaced, first by steel screens and then by steel plates, both the screens and plates were torn down by the inmates, and the security problems concerning escape and access to contraband continued.

Nor does the order adequately address the testimony presented by the county that "non-breakable" glass is unsuitable in that it can, in fact, be broken by objects available to the inmates and that the material used in other transparent plastic windows will not meet fire regulations. Without the appropriate findings and evidence to support them, the concrete windows cannot be characterized as an "exaggerated response" by county officials in this case. *See Wolfish, supra*, 441 U.S. at 561-62, 99 S. Ct. at 1885-86; *cf. Hoptowit v. Ray, supra*, 682 F.2d at 1246-47 (totality of conditions may not justify relief which must be based on showing of independent constitutional violation), *citing Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981). Since the record contains no indication that, given the security problems attendant to the use of windows in this facility, any more appropriate response exists, we must conclude that the county's action with respect to the windows was justified by legitimate security objectives. The district court therefore erred in requiring reinstallation of transparent windows.

V

Conclusion

We have carefully and thoroughly reviewed the district court's orders to determine, in each instance, whether the standards set forth by the Supreme Court in *Wolfish* properly

were followed. The orders with respect to contact visitation and cell searches are affirmed. The order with respect to transparent windows is reversed. Each party is to bear its own costs.

DISSENTING OPINION.

Rutherford et al. v. Pitchess, et al., No. 81-5461.

Filed: July 14, 1983.

POOLE, Circuit Judge, concurring in part and dissenting in part:

Because I believe that the outcome is controlled by *Bell v. Wolfish*, 441 U.S. 520 (1979) ("Wolfish"), I dissent from part III of this opinion, concerning prisoner observation of cell searches. I concur in the remaining portions of the opinion.

The majority seeks to find a distinction between this case and the situation in *Wolfish*, insofar as both consider the problems posed by cell "shakedowns." A fair reading of the Supreme Court's holding in *Wolfish* would not permit a distinction with meaning to be drawn. In *Wolfish*, the prison officials established a policy which did not permit prisoners to observe the searches of their cells, citing security concerns and a fear that the prisoners would be able to evade or frustrate the searches. *Id.* at 555. The prisoners objected because they suspected the guards of theft. *Id.* at 556. In the present case, the identical policy had been adopted by the jail officials, citing the same security and evasion concerns; the prisoners object essentially because they fear the improper confiscation of their property.

Faced with the competing concerns which underlay the search policy and the objections thereto, the Court held that the policy should not be enjoined, stating:

... proper deference to the informed discretion of prison authorities demands that they, and not the courts,

make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees.

Id. at 557 n.38 (citations omitted). The Court's language could hardly be more clear, and there is no basis for holding that it does not provide controlling guidance in this case.

The distinctions relied upon by the majority are, I believe, without substance. First, it is claimed that the district court in *Wolfish* failed to weigh the prison official's security and evasion concerns in framing its order. Since the district judge in this case did expressly address those concerns, his order—essentially the same as that issued by the district court in *Wolfish*—is thought to be permissible. However, it is factually inaccurate to state that the district court in *Wolfish* did not also weigh those concerns. See *United States ex rel. Wolfish v. Levi*, 439 F.Supp. 114, 148-49 (S.D.N.Y. 1977).

A second basis for distinguishing *Bell v. Wolfish* cited by the majority is that the constitutional basis for invalidating the search policy relied upon by the district and appellate courts in that case was limited to privacy and fourth amendment concerns. In the case at bar, the majority notes, the district court found a due process claim grounded in the improper confiscation of prisoners' property. Again, this distinction is strained, to say the least. While the district court in *Wolfish* confined its constitutional discussion to fourth amendment concerns, both that court and the Second Circuit on appeal stressed that the primary concern of the prisoners was the potential theft of their property—the same, allegedly new concern raised by Judge Gray here. See 439 F.Supp. at 148-49; 573 F.2d at 131. Further, the Second Circuit in *Wolfish* explicitly noted that the cell searches could give rise to a due process claim in certain circum-

stances. See 573 F.2d at 131 n.29 (due process requires that receipts be given for property seized during cell searches).

Further, in *Wolfish* the Court determined that injunctive relief barring cell searches unless the prisoner was permitted to observe the search was improper when the concern was the possible theft of property. The Court suggested instead that actions for damages were the proper remedy, *even if the thefts rose to the level of constitutional violations*. See 441 U.S. at 557 n.38. This, of course, reflects the traditional doctrine that injunctive relief is inappropriate unless there has been a showing that legal remedies are inadequate. *Beacon Theatres v. Westover*, 359 U.S. 500, 506-07 (1959). But even if the potentially repetitive incidence of violations of personal property rights could under some circumstances warrant injunctive relief, the Supreme Court has told us, on facts almost exactly similar to those found here, that this cell-search practice violates no constitutional provision and should not be conditioned on the inmate's physical presence. *Bell v. Wolfish*, 441 U.S. at 555-557.

The district court in *Wolfish* and Judge Gray here considered the same concerns of the correctional officials and the inmates, and ordered the same injunctive relief. The Supreme Court rejected that approach in *Wolfish*, and our obligation now must be to heed the plain language of the Supreme Court's ruling and to reverse the order issued by the district court.

B. Memorandum Opinion Filed August 8, 1980.

United States Court of Appeals for the Ninth Circuit.

Dennis Rutherford, Harold Taylor, and Richard Orr, Plaintiffs-Appellees, v. Peter J. Pitchess, as Sheriff of the County of Los Angeles; William Anthony, as Assistant Sheriff of the County of Los Angeles; John Knox, as Chief of the Corrections Division of the Los Angeles County Sher-

iff's Department; James White, as Commander of the Los Angeles County Central Jail; and Edward Edelman; Kenneth Hahn, James Hayes, Peter Schabarum and Baxter Ward, as Supervisors of the County of Los Angeles, Defendants-Appellants. Nos. 79-3061, 79-3367. DC #CV 75-4111-WPG.

Appeal from the United States District Court for the Central District of California, William P. Gray, District Judge, presiding.

Before: Markey,* Court of Customs & Patent Appeals Judge, and Pregerson and Ferguson, Circuit Judges.

Plaintiff pretrial detainees brought this class action as a comprehensive challenge to conditions of their confinement at the Los Angeles Central Jail. After a 17-day court trial and two personal inspections of the jail, the district court ordered 12 changes in jail conditions and restrictions. The court explained its rulings in two thorough memoranda of decision, which revealed the court's careful consideration of all the aspects of the detainees' confinement.

The court's orders required jail administrators to: (1) cease making "overflow" men sleep on mattresses on the floors; (2) permit unaccompanied minor children to visit an inmate parent upon the inmate's request; (3) allow all inmates two and one-half hours' exercise per week, and work toward allowing one hour per day; (4) re-establish television viewing in the day rooms; (5) develop a new program for processing inmates for court appearances so that those on trial do not leave bed before 6:00 a.m., do not spend time confined in holding cells, travel 30 minutes or less on buses and return not later than 8:00 p.m.; (6) eliminate overcrowding in the holding cells for prisoners who must make court

*The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

appearances but are not then on trial; (7) provide more telephones; (8) allow inmates at least 15 minutes for meals; (9) furnish clean laundry twice weekly; (10) permit inmates to watch the guards conducting searches of their cells; (11) re-install windows in the cells; and (12) allow low-risk detainees who are imprisoned for more than one month to receive one contact visit per week, providing for a maximum of 1,500 such visits per week. The Sheriff appeals only the latter three requirements. The remaining nine are therefore final.

The attorney for the pretrial detainees, an American Civil Liberties Union (ACLU) attorney, moved the court for an award of attorney's fees under 28 U.S.C. § 1988. He requested \$201,266 for 1006.33 hours' work. The court awarded \$90,000, which it calculated on the basis of \$60/hour for 1,000 hours, with a 1.5x incentive multiplier. The Sheriff appeals the award.

INJUNCTIVE RELIEF

After the district court issued its orders, the Supreme Court decided *Bell v. Wolfish*, 441 U.S. 520 (1979), in which it set forth two tests for evaluating constitutional attacks by pretrial detainees on conditions and restrictions during their confinement. Where a condition implicates the fourteenth amendment's protection against deprivation of liberty without due process, the proper inquiry is whether the condition amounts to punishment. *Id.* at 538. A condition is punitive if there is a showing of express intent to punish. Otherwise, if a particular condition is reasonably related to a legitimate nonpunitive objective, it does not, without more, amount to punishment. *Id.* Legitimate objectives include both insuring the detainee's presence at trial and facilitating the effective management of the facility. *Id.* at 539-40.

Where a restriction implicates another constitutional right as well, a court must assess whether the condition or restriction impermissibly infringes that right. In making that assessment, however, the court must recognize that the essential goals of maintaining security and preserving internal order and discipline may require some limitation on the constitutional rights of detainees, *id.* at 546, and must grant wide-ranging deference to prison administrators in the adoption of policies to serve these goals. *Id.* at 547-48.

The district court here articulated standards that track closely those the Supreme Court subsequently laid down in *Wolfish*. Relying on case law to the date of its decision, however, the district court also observed that proof of the availability of less restrictive means demonstrated that prison officials had exaggerated their response to security concerns. *Wolfish* rejected this mode of analysis. *Id.*

Accordingly, we must remand the case to the district court for reconsideration of the three challenged orders in light of *Bell v. Wolfish*. See *Lombard v. Marcera*, 442 U.S. 915 (1979), *vacating for reconsideration, Marcera v. Chinlund*, 595 F.2d 131 (2d Cir. 1979). With its extensive knowledge of all the conditions of Central Jail and the factors underlying the prison administrators' actions, the district court can apply the *Wolfish* standards without further trial on the facts.

ATTORNEY'S FEES

The Sheriff attacks the award of attorney's fees on three grounds: (1) the district court did not conduct an evidentiary hearing; (2) the fees are unreasonable and produce a wind-fall; and (3) the court did not set forth the factors underlying its decision.

While the district court did not conduct a full evidentiary hearing with witnesses, it did review numerous documents,

including deposition testimony and affidavits, and it conducted an in-court proceeding on the attorney's fees issue, the transcript of which runs ten pages. Moreover, the Sheriff has not disputed any of the facts material to decision of the ACLU's motion for attorney's fees, and the trial court would have discretion whether to conduct an evidentiary hearing even if the motion did involve disputed facts. Fed. R. Civ. P. 43(e).

Similarly, we reject the Sheriff's argument that the fees are per se unreasonable because awarding a public interest law firm fees computed under prevailing market rates produces a windfall and because the district court used an incentive multiplier. It is well established that a court setting a reasonable fee award must consider the twelve factors initially propounded by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *Dennis v. Chang*, 611 F.2d 1302, 1306 & n.9 (9th Cir. 1980); *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105 (9th Cir. 1979). The *Johnson* standards apply regardless of whether the prevailing attorney works for a public interest law firm. *Dennis v. Chang*, *supra*, 611 F.2d at 1306; *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974). The use of an incentive multiplier is appropriate where the possibility of success is contingent and the quality of the work is high. See *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547, 553 n.3 (1978), *cited with approval* in S. Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. Code Cong. & Admin. News 5908, 5913.

Because the district court did not set forth the array of factors underlying its fee decision, however, we must remand the issue to allow the court to state the factors contributing to its fee award. *Ellis v. Cassidy*, slip op. at 3852

(June 20, 1980); *Fountila v. Carter*, 571 F.2d 487, 496 (9th Cir. 1978). See *Gluck v. American Protection Industries*, slip op. at 3159 (May 12, 1980).

REMANDED for further proceedings consistent with this opinion.

2. Opinions and Judgment of the District Court.

A. Memorandum Decision Filed May 18, 1981.

United States District Court, Central District of California.

Dennis Rutherford, Harold Taylor and Richard Orr, et al., Plaintiffs, vs. Peter J. Pitchess, et al., Defendants. Case No. CV 75-4111-WPG.

MEMORANDUM OF DECISION.

On February 15, 1979, this court, after a trial of the class action here concerned, entered an order requiring several changes in practices and conditions of confinement in the Los Angeles County Central Jail (the jail). Three of these requirements were appealed. On August 8, 1980, the Court of Appeals remanded the case to this court for reconsideration of the three challenged orders in light of *Bell v. Wolfish*, 441 U.S. 520 (1979), which was decided after those orders were rendered.

The three orders here concerned read as follows:

"2.(b) *Contact Visits*. Commencing not more than ninety days following the date of this order, the defendants will make available a contact visit once each week to each pre-trial detainee that has been held in the jail for one month or more, and concerning whom there is no indication of drug or escape propensities; provided, however, that no more than fifteen hundred such visits need be allowed in any one week. In the event that the number of requested visits in any week exceeds fifteen hundred, or such higher number as the Sheriff voluntarily undertakes to accommodate, a reasonable system of rotation or other priorities may be maintained. The lengths of such visits shall remain in the discretion of the Sheriff."

"5. *Restoration Of Windows*. Within ninety days following the filing of this order, transparent windows shall be restored in each portion of the jail from which

they previously have been removed.”

“8. *Cell Searches.* Inmates that are in the general area when a ‘shakedown’ inspection of their cells is undertaken shall be permitted to be sufficiently proximate to their respective cells that they may observe the process and respond to such questions or make such requests as circumstances may indicate.”

The factual findings and the legal analyses upon which such orders were based are set out at length in a Memorandum of Decision dated July 25, 1978 (457 F. Supp. 104) and a Supplemental Memorandum of Decision dated February 15, 1979. In those memoranda I undertook to discuss the considerations that guided this court in its attempt to find the appropriate balance between the competing goals of institutional security, order and safety, on the one hand, and the need to preserve for the inmate such of his constitutional rights as the fact of his incarceration permit.

Pursuant to the mandate of the Court of Appeals, I have studied thoroughly the opinion in *Bell v. Wolfish* and have reexamined my memoranda of July 25, 1978, and February 15, 1979, in light of its teachings. I find nothing in *Bell v. Wolfish* that renders inappropriate any of the three challenged orders, and they therefore are reaffirmed.

Justice Rehnquist’s opinion in *Bell v. Wolfish* asserts at the outset that “. . . under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.” (441 U.S. at 535). It then states that the court must decide whether the disability complained of “. . . is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. [Citation omitted] Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on ‘whether an alternative purpose to which [the restriction]

may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’ ” (Citations omitted).

This court does not conclude that the Sheriff or his subordinates were consciously motivated by a desire to punish in creating the situations that my orders sought to remedy. However, in each instance, the conclusion is believed to be inescapable that the action was, in the words of the Supreme Court, “. . . excessive in relation to the alternative purpose assigned to it.” (Quoted *supra*). The assigned purpose was security, but, as I undertook to set out in the earlier memoranda, the deprivation imposed upon the detainees clearly exceeded the reasonable requirements of security. I conclude from the opinion in *Bell v. Wolfish* that under such circumstances an intent to punish may be inferred, irrespective of the actual motivation of the authorities. The punishment imposed upon an inmate can be no more tolerable because it stems from an unreasonable fixation upon security rather than from a desire to be vindictive. I believe that Justice Rehnquist recognized this in his reference, in footnote 20, to an example of loading a detainee with chains and shackles.

Thus, it seems to me that, regardless of how it is phrased, the test still remains: “What is reasonable under the circumstances? This is the question that I sought to answer in the memoranda upon which the three orders were based. I was trying to find the “mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application,” to which Justice Rehnquist referred in his opinion. (441 U.S. at 546).

Contact Visits. Surely, it cannot be denied that to deprive an inmate, for long periods of time, of any opportunity to embrace his wife or hug his children is very traumatic treatment. And if such treatment is not made necessary by the

reasonable requirements of security, it constitutes severe punishment. Naturally, any allowance of contact visits creates problems for the jailer, and, naturally, he would prefer to avoid such problems altogether. However, these well-recognized problems cannot be considered intolerable if limitations are imposed as to numbers and frequency of visits allowed, and if such visits are accorded only to those who are identified as low security risks. To my own knowledge, many other penal institutions, including the Metropolitan Correctional Center in New York City with which the decision in *Bell v. Wolfish* was concerned, have regularly accorded contact visits.

For the defendants here to make categorical rejection of all proposals involving any such visits is believed to constitute overreaction that is not consistent with the balancing process that the Constitution requires. In light of such refusal to undertake such balancing process, I have felt obliged to do so, as is shown in my earlier memoranda. Paragraph 2.(b) is the result of these efforts.

Windows. Little need be said here in addition to the discussion in my earlier memoranda. The building was built with transparent windows, according to design. Even if the detention personnel were to conduct themselves in a manner considerably below the high standards of vigilance with which the jail is regularly maintained, the presence of the windows could present no reasonable risk of escape or importation of contraband. The action of the Sheriff in replacing all of such windows with solid sheets of steel, thus cutting off all view of the outside world, was overreaction akin to the chains and shackles example in footnote 20 to Justice Rehnquist's opinion.

The defendants have made some suggestion that retention of the sheets of steel is necessary in order to maintain proper operation of the air conditioning system. Any such conten-

tion is absurd. If the air conditioning system needs strengthening or other modification, such correction certainly can be made without the need to seal up the occupants in this manner.

Cell Searches. The conclusion that I must adhere to my prior order with respect to cell searches has given me some concern, because the opinion in *Bell v. Wolfish* held that a similar order was not constitutionally required. Certainly, this court is mindful of its duty to adhere, without question, to decisions of the Supreme Court. However, I believe that there are factors that significantly distinguish this case from *Bell v. Wolfish*.

As my memorandum of February 15, 1979, shows, I observed the alternative processes of unannounced cell shakedown under which the inmates were (Method C) and were not (Method A) allowed to observe the searches. Under Method C, and unlike the situation envisaged by the officials involved in *Bell v. Wolfish*, there is no opportunity for "... the inmates to attempt to frustrate the search by distracting personnel and moving contraband from one room to another ahead of the search team." (See 441 U.S. at 555).

Also, according to the opinion in *Bell v. Wolfish*, "[t]he Court of Appeals did not identify the constitutional provision on which it relied in invalidating the room-search rule" (see 441 U.S. at 556), and the District Court found a violation of the Fourth Amendment, which the Supreme Court ruled to have been in error (see 441 U.S. at 557). Having witnessed the comparative ease and institutional security and safety under which a prisoner can be allowed to observe the search of his cell, it seems to me that to refuse such observation is contrary to the Due Process Clause of the Fourteenth Amendment.

The possessions that a man is allowed to keep in his cell are meager, indeed, being limited to things like a few pic-

tures, magazines, cigarettes, candy bars, and perhaps an extra pair of socks. Nonetheless, these items are cherished by the inmates. Enforcement of regulations as to what may be maintained is left, in large measure, to the discretion of the officer conducting the search. My own limited observation, as is mentioned in my memorandum of February 15, 1979, revealed an instance upon which the opportunity for a prisoner to make a plea or an explanation on his own behalf resulted in saving his property from confiscation. It was obvious that this fact meant a good deal to him, and I believe that the incident justifies a significant generalization.

Due process, after all, means fair treatment under the circumstances. I believe that to allow these prized possessions to be confiscated under subjectively enforced regulations, without giving the possessor any opportunity to explain or protest or entreat, deprives him of his property without due process of law.

The Court of Appeals remanded this case because, in rendering my decision, I relied, in part, upon the belief that "... proof of the availability of less restrictive means demonstrated that prison officials had exaggerated their response to security concerns, and that *Wolfish* rejected such a mode of analysis." (See Court of Appeals Memorandum Decision of August 8, 1980, page 3). In giving reconsideration to this matter, I put aside altogether the now rejected doctrine and base my reaffirmance upon the other portions of my earlier memoranda and upon this memorandum, all of which I believe to be in harmony with *Bell v. Wolfish*.

DATED: May 18, 1981.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

B. Supplemental Memorandum Opinion and Judgment, Filed February 15, 1979.

United States District Court, Central District of California.

Dennis Rutherford, Harold Taylor, and Richard Orr, et al., Plaintiffs, v. Peter J. Pitchess, et al., Defendants. Case No. CV 75-4111-WPG.

On July 25, 1978, this court issued a Memorandum of Decision in which it concluded, from the evidence at trial, that specific corrective action would be required concerning certain conditions and policies at the Los Angeles County Central Jail. The Memorandum expressed a reluctance to impose specific requirements with regard to other conditions and policies without further consideration. For this reason, no order was issued, and additional evidentiary hearings were held, followed by further briefing.

In the meantime, the defendant Sheriff has adopted and has begun to implement, even without an order, most of the changes proposed by the court. Such action provides further manifestation of the good faith of the Sheriff and his principal assistants. They and their counsel, like the attorney for the plaintiffs, have displayed throughout this litigation a willingness to work out reasonable solutions to the problems involved in these proceedings. The attitude thus displayed by the jail authorities has been a strong reminder to the court that it should defer to the expertise of the "jailer" to all appropriate extent.

As stated in my earlier Memorandum, this court is aware that "... [t]he problem ... in each of the issues here concerned is to determine the point at which the implementation of the goals of security and order and safety must be balanced by the need to preserve for the inmate all of the constitutional rights that the fact of his incarceration will permit." In resolving the remaining issues in this Memo-

random, I have sought to apply the test of whether the challenged conditions or restrictions are reasonably necessary to the maintenance of security, order and safety in the institution, or whether they constitute an exaggerated response by the custodial officials to these considerations. This test was ably expounded in the case of *Feeley v. Sampson*, 570 F.2d 364 (1st Cir. 1978). Theoretically, it is less burdensome upon the custodial authority than the "strict scrutiny" standard, under which a state must justify every restriction imposed upon an inmate as being based upon a "compelling interest," and must show that there is no feasible "less restrictive alternative." See, *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978). However, at least for purposes of this case, applications of the two tests involve differences only as to starting points, and the results are substantially the same whichever path of analysis is followed. We are dealing with pre-trial detainees, men who have not been convicted and thus still are entitled to as much benefit from the presumption of innocence as may be accorded them, granted the need to confine them to insure their presence at trial. "Any restriction or condition that is not reasonably related to this sole stated purpose of confinement would deprive a detainee of liberty or property without due process, in contravention of the Fourteenth Amendment." See, *Campbell v. McGruder*, 580 F.2d 521, 528 (D.C. Cir. 1978), quoting from *Duran v. Elrod*, 542 F.2d 998, 999-1000 (7th Cir. 1976). Under such circumstances, if jail security and order can be protected by less restrictive means, the conditions and practices challenged here must be deemed unreasonable as an exaggerated response.

Hence, in undertaking to decide these remaining issues, the court is again confronted with the question of what is reasonable. This question involves consideration of, *inter*

alia: the constitutional rights of the inmates; the need to preserve security, order and safety in the jail; the understandable propensity of the Sheriff to favor the latter consideration when the two are not fully harmonious; and the duty of the court to give appropriate deference to the expertise of the Sheriff and still fulfill its above-mentioned constitutional responsibility.

Contact Visits. Testimony at the supplemental hearing reaffirmed the court's awareness of how important it is to a prisoner that he be able to have contact visits from time to time with persons that are emotionally close to him. Such testimony also demonstrated clearly the great burden that would be imposed upon the jail authorities and the public if such contact visits were to be accorded all or most of the five thousand prisoners at the jail. Expensive construction would be required in order to create a new, large and secure visiting area that would be insulated from the jail and from the outside by separate sally ports. The processing of visitors would have to include careful identification, sometimes including interviews, personal searches and the checking of hand-carried articles. Prisoners necessarily would be strip-searched upon leaving the visiting area. Substantially increased numbers of guards would be required for visual surveillance and supervision.

This complicated, expensive, and time-consuming process, coupled with the fact that contact visits are inherently more protracted than those that can be terminated simply by cutting off the telephones, inevitably would reduce far below the present level of two thousand per day the numbers of visits that could be accommodated.

A further problem that is of great concern to the jail authorities is the fact that the establishment of any program of contact visits does increase the importation of narcotics into a jail, despite all safeguards and precautions. The Sher-

iff also is concerned about the increased possibility of the introduction of weapons and of escape attempts with the taking of hostages.

From the foregoing summary, it is apparent that many factors strongly militate against the allowing of contact visits. Most of the pre-trial detainees remain at the jail only for a few days or weeks, and I cannot conclude that their hardship in being unable to embrace their loved ones for such a limited period of time renders unreasonable the unwillingness of the Sheriff to accommodate them in this respect. The impracticability of such accommodation is so great that this deprivation must be considered to be one of the inconveniences that necessarily stem from the need for incarceration.

However, the foregoing discussion does not solve the entire problem. In *Campbell v. McGruder*, 580 F.2d 521, 532 (D.C. Cir. 1978), Chief Judge Bazelon said, in writing the opinion for the court: "[T]he responsibilities of the jail increase as the period of the detainee's incarceration grows longer. Conditions that might be tolerable for ten days, might be unacceptable if imposed for a month or longer." I believe this statement to be pertinent here. Unfortunately, considerations of public safety make it necessary that some accused (but not yet convicted) defendants be obliged to remain in custody for many months pending trial. I have become convinced that in such instances the factors that make it impracticable to provide contact visits for large numbers of men with stays of short duration are much less compelling. On the contrary, I believe that if a man is incarcerated in the jail for more than a few weeks, principles of basic human decency require that all reasonable attempts be made to permit him to kiss his wife or his girlfriend and to hug his children once in a while during this long, difficult and inherently depressing period in his life.

By the time that a man has been held for a month, quite a bit is known about him, due to the investigative and classification process that has been conducted, and the opportunity to observe his day to day conduct. If contact visits were to be limited to men who have been in uninterrupted custody for a month or more and who are not determined to be drug oriented or escape risks, the number of prisoners eligible for such treatment would be reduced greatly, and by placing a maximum limit upon the total number of contact visits per week, the scope, burden and dangers of the program would be substantially diminished.

Such a curtailment in the number of contact visits would mean that the massive construction that would be required in order to facilitate such visits for the entire jail population could be avoided. Modest alteration within the jail presumably could provide appropriate space, or the Sheriff might choose to establish a facility for such visits outside the jail and transport the inmates back and forth.

An order will be issued requiring the defendants to make available a contact visit once each week to each pre-trial detainee that has been held at the jail for one month or more and concerning whom there is no indication of drug or escape propensities; provided, however, that no more than fifteen hundred such visits need be allowed in any one week. In the event that the number of requested visits in any week exceeds fifteen hundred, or such higher number as the Sheriff voluntarily undertakes to accommodate, a reasonable system of rotation or other priorities may be maintained. The lengths of such visits shall remain in the discretion of the Sheriff.

Rooftop Recreation. In my earlier Memorandum, I expressed the lament that the defendants have "... substantially ruined [the roof] as a place for basketball and other team sports by installing upright lengths of steel pipe every

twenty-seven feet throughout the floor surface." Counsel for the defendants, in his brief, referred to such comment as an instance in which "The Court has wandered off on a lark of its own" Upon further reflection, I am forced to the conclusion that counsel is right and that no corrective order is appropriate. I am still convinced that "[i]f the jail authorities were to put their minds to the matter, . . . they would find ways to remove all or most of those posts that so seriously diminish the adequacy of the roof for physical exercise, and still keep the escape and assault risks under reasonable control." However, I suppose that whether the roof conditions permit the inmates to play full-court basketball or unnecessarily restrict them to "half-court" is a matter that does not rise to constitutional dimensions.

Restoration Of Windows. Evidence at the supplemental hearing has in no sense altered my conviction that the windows must be restored in the original portion of the jail. The right of the inmates not to be deprived of all view of the outside world far outweighs the inferred danger of serious escape attempts or contraband importation through holes that might be made in the "unbreakable" glass available for installation.

From the testimony at the supplemental hearing, it appears that an agile inmate wielding a heavy metal instrument could break the best available glass by giving it from thirty to forty heavy blows. The noise created by such activity would reach a decibel count of between 100 and 120, which is roughly equivalent to the sound of a nearby jet aircraft beginning its takeoff.

Alternatively, an inmate with a propane torch, or a cell-made substitute therefor, could penetrate the best "security proof" glass and, in about four to eight minutes, make a hold large enough for a person to squeeze through. A by-product of such effort would be a large quantity of black

pungent smoke.

Beyond doubt, the jail is ably administered, a fact that militates heavily against an inmate having access to an iron bar or a torch. It also seems reasonable to assume that the noise or the smoke created by any such benighted venture would attract the attention of an alert guard well before a significant breach could be accomplished. Also, if a hole were to be made in a window, I have no doubt whatever of the resourcefulness of the jail authorities in being able to prevent narcotics or other contraband from being passed through the opening pending permanent restoration.

The replacing of the windows with sheet steel clearly was an exaggerated response to a remote danger and was in derogation of the legitimate interests of the detainees. The windows must be restored promptly.

Cell Searches. In my earlier Memorandum, I expressed the conclusion that "... shakedowns should be made while the respective inmates remain outside their cells but near enough to observe the process and raise or answer any relevant inquiry." This conclusion now is reaffirmed, particularly in light of the subsequent demonstration of four alternative methods of cell search presented by the Sheriff. Method A involved searching all of the cells in a row while the inmates remained in the day room, which is the manner in which searches currently are conducted. In Method C, the men occupying a particular cell were brought from the day room and stood outside their cell while it was being searched. When such search was completed, the men were locked in their cell and the remaining cells were searched successively in the same manner. Methods B and D are so unsatisfactory and expensive that no further comment concerning them is indicated.

According to the statistics reported by the defendants, Methods A and C take substantially the same amount of

time, and C is slightly more expensive, due to the need to utilize a few more deputies to escort the prisoners and to insure against assault upon the deputies that are engaged in searching the cell.

At the invitation of counsel for the defendants, I asked two "experienced" inmates whose cell was being searched which method they preferred. The ready responses were that they preferred to be present so that they could see what was going on, and in order that they might seek to explain why certain questioned items should not be removed. Coincidentally, while I was watching the search of that very cell, one of the deputies started to remove a magazine as not being sufficiently current and thus in violation of regulations designed to minimize fire danger by preventing accumulation of old periodicals. Upon being asked to reconsider, the deputy found that it was not as old as he had thought and left it. The same deputy started to discard another magazine on the ground that it lacked a cover. The inmate urged him to riffle the pages a bit; he did; the cover thereupon appeared; and the magazine stayed in the cell.

These are small matters; but they are important to the detainees, and their legitimate interests in protecting their meager possessions outweigh the small increase in the burden upon the defendants.

Implementing Judgment. I believe that my Memorandum of July 25, 1978, and this Memorandum cover all of the matters concerning which affirmative action is deemed by the court to be required. A judgment containing such orders will be filed contemporaneously herewith. In all other respects, I find that the issues raised by the plaintiffs (apart from the medical issues, which are involved in separate pending proceedings) do not merit court intervention at this time.

This Memorandum and the Memorandum of July 25, 1978, shall constitute findings of fact and conclusions of law, as provided in Rule 52(a) of the Federal Rules of Civil Procedure.

DATED: February 15, 1979.

/s/ William P. Gray

WILLIAM P. GRAY

United States District Judge

Judgment.

United States District Court, Central District of California.

Dennis Rutherford, Harold Taylor, and Richard Orr, et al., Plaintiffs, v. Peter J. Pitchess, et al., Defendants. Case No. CV 75-4111-WPG.

Filed Feb. 15, 1979.

In this action, the plaintiffs, on behalf of inmates of the Los Angeles County Central Jail, challenge certain policies and practices of the defendant administrators of the jail and the living conditions under which the inmates are maintained. The matter has been tried and briefed, and the court has made findings of fact and conclusions of law in the form of a Memorandum of Decision filed on July 25, 1978, and a Supplemental Memorandum of Decision that is being filed contemporaneously herewith. In accordance with such findings, the court renders this judgment.

IT IS ORDERED AS FOLLOWS:

1. *Beds.* Every prisoner kept overnight in the jail will be accorded a mattress and a bed or bunk upon which to sleep.

This order shall not preclude the defendants from permitting inmates to be housed with full bedding but without a bunk, for one night only, if, in the defendants' judgment, such inmate or inmates require more secure housing than is

provided in the available areas and the appropriate housing does not have a sufficient number of bunks. Further, this order shall not apply in the event of an emergency causing a sudden and unusual intake of prisoners, in which case full bedding shall be provided and the defendants will exercise their best efforts to provide bunks for all inmates as soon as possible.

2. *Visitation.*

(a) *Visits By Children Of Prisoners.* Upon prior request from a prisoner, his minor children over the age of twelve (12) years shall be permitted to visit him unaccompanied by an adult.

(b) *Contact Visits.* Commencing not more than ninety days following the date of this order, the defendants will make available a contact visit once each week to each pre-trial detainee that has been held in the jail for one month or more, and concerning whom there is no indication of drug or escape propensities; provided, however, that no more than fifteen hundred such visits need be allowed in any one week. In the event that the number of requested visits in any week exceeds fifteen hundred, or such higher number as the Sheriff voluntarily undertakes to accommodate, a reasonable system of rotation or other priorities may be maintained. The lengths of such visits shall remain in the discretion of the Sheriff.

3. *Outdoor Recreation.* All prisoners except those that are hospitalized, in disciplinary segregation, those under the jurisdiction of the medical staff of the Forensic Mental Health Unit who such medical staff determine are inappropriate for roof recreation, and except for those high security inmates who the Sheriff believes cannot safely be permitted roof recreation shall be allowed not less than two and one-half hours of outdoor exercise or other recreation per week.

Within sixty days following the date of this order, the Sheriff shall report to the court the number of inmates under the jurisdiction of the Forensic Mental Health Unit and the number of high security inmates included in the roof recreation program and the nature of alternative recreation provided for high security inmates not allowed roof recreation.

4. *Indoor Recreation.* Television receiving sets shall be installed and reasonably maintained in each day room.

5. *Restoration Of Windows.* Within ninety days following the filing of this order, transparent windows shall be restored in each portion of the jail from which they previously have been removed.

6. *Processing For Court.* As soon as practical, but not more than four months from the date of this order.

(a) each detainee placed in a holding cell will be given a chair or a bench upon which to sit;

(b) on each day of trial after the first day a detainee will not be required to leave his bed earlier than 6:00 A.M., and will not be confined in a holding cell for longer than thirty minutes, either before leaving for court or following his return; and his waiting time on a bus at the jail will not exceed thirty minutes; and he will be returned to his cell not later than 8:00 P.M.

Within four months from the date of this order, the Sheriff shall report his progress in this regard to the court and the reasons, if any, for his inability to comply in all respects. At that time, the court will review this portion of this order as to whether there is any justification for modification thereof.

7. *Telephones.* On January 5, 1979, a separate order was filed approving and directing implementation of a plan for the improvement of telephone facilities in the jail. Accordingly, no further order is indicated on this subject at

this time.

8. *Cell Searches.* Inmates that are in the general area when a "shakedown" inspection of their cells is undertaken shall be permitted to be sufficiently proximate to their respective cells that they may observe the process and respond to such questions or make such requests as circumstances may indicate.

9. *Time For Meals.* An inmate shall be allowed not less than fifteen minutes within which time to complete each meal.

10. *Change Of Clothing.* Effective not more than sixty days following the filing of this order, each inmate shall receive at least twice each week clean outer garments, undergarments, socks and a towel in exchange for those that he has been using.

11. *Injunctive Relief.* When any inmate has information that he believes to disclose a violation of this order, he may set forth that information in writing to the Commander of the jail who shall cause an investigation thereof to be made as soon as reasonably practicable, and in any event within ten days following receipt of such written statement. Promptly following the completion of the investigation the Commander shall deliver a written reply to the inmate indicating the results thereof and what, if any, action has been taken concerning the inmate's complaint and what, if any, action has been taken to prevent violations of this judgment. Absent unusual circumstances indicating compelling reasons why following this procedure would result in substantial prejudice to the inmate, no petition for a judgment of contempt for violation of this order shall be entertained by the court until the inmate first complies with this administrative procedure. In considering any petition for contempt for violation of this order, the court shall take

into account the appropriateness of any action taken by the jail Commander in response to information provided him in accordance with this procedure.

12. *Emergencies.* In the event that the Sheriff or his authorized representatives have reasonable cause to believe that there exist facts showing a serious imminent threat to the security of the jail or the safety of any persons therein that would occur if any of the provisions of this decision were enforced and there is insufficient time to seek a formal modification or exception to such provisions, the Sheriff may temporarily suspend such of the provisions of this decision as may be necessary to overcome or reduce such threat for a period not exceeding five court days, provided he submits a statement in writing to this court setting forth what he has done and why he has done it.

13. *Posting Of This Judgment.* The defendants and their successors in interest shall cause this judgment to be posted permanently and conspicuously in each prisoner housing area in the jail for the period of one year; thereafter, the defendants and their successors in interest shall permanently and conspicuously post this judgment in each of the jail's law libraries.

14. Counsel for the plaintiffs shall recover his costs incurred in this action.

DATED: February 15, 1979.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

C. Reported Memorandum Opinion, 457 F.Supp. 104 (C.D. Cal. 1978).

United States District Court, Central District of California.

Dennis Rutherford, Harold Taylor, and Richard Orr, et al., Plaintiffs, v. Peter J. Pitchess, et al., Defendants. Case

No. CV 75-41111-WPG.

Filed July 25, 1978.

This action seeks injunctive and declaratory relief, on constitutional grounds under 42 U.S.C. § 1983, against certain practices and conditions of confinement at the Los Angeles County Central Jail (the "jail"). The court previously has established the plaintiff class as consisting of all prisoners in the jail since December 31, 1975. The court finds that the class is so numerous that joinder is impracticable; that the questions of law and fact and the claims presented by the class representatives are common to the class; and that the outstandingly competent representation provided the named plaintiffs by Terry Smerling, Esq., of the ACLU Foundation of Southern California, will adequately protect the interests of the class as a whole.

The defendants are the Sheriff of Los Angeles County, some of his subordinates that are concerned with the administration of the jail, and the members of the County Board of Supervisors.

Trial of this case involved about seventeen days of testimony, the receipt of many exhibits, and the submission of thoroughly prepared pre-trial and post-trial briefs. In addition, with the prior agreement of counsel, the court made unannounced visits to the jail on September 23, 1977, and June 12, 1978.

The plaintiffs have challenged the constitutionality of many aspects of the housing and treatment of inmates at the jail. In this memorandum, I shall undertake to resolve these issues, bearing in mind, as best I can, the dilemma that confronts every federal judge before whom a case such as this is litigated. On the one hand, we are reminded that "... courts are ill equipped to deal with the increasingly urgent problems of prison [and presumably "jail"] admin-

istration and reform", *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), and that considerations of institutional security should be left to the expertise of state correctional officials unless they "have exaggerated their response to these considerations." *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

On the other hand, these same decisions go on to state that "[c]ourts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Pell v. Procunier*, 417 U.S. at 827, and that:

"... a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. at 405 (1974).

Every inmate in a penal institution, by the very fact of his incarceration, necessarily is deprived of some of the constitutional rights that otherwise would be his to enjoy. *Price v. Johnston*, 334 U.S. 266, 285 (1948). But he retains those rights "... that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. at 822. Of course, institutional security and order and the physical safety of jail personnel and inmates are necessarily paramount objectives of any jail administrator. If those were the only considerations, there would be no occasion for a court to "second guess" the expertise of the Sheriff in pursuing such objectives. The problem, then, in each of the issues here concerned is to determine the point at which the implementation of the goals of security and order and safety must be balanced by the need to preserve for the inmate all of the constitutional rights that the fact of his incarceration

will permit.

Issues of this nature have been brought to federal courts with increasing frequency during the past several years, and the task of accomplishing this balancing process is always difficult. Most courts are sympathetically mindful of the problems of the "jailer" and desire to defer to his experience and expertise to all appropriate extent. On the other hand, as Judge Frankel said in *United States ex rel Wolfish, et al., v. Levi*, 439 F. Supp. 114, 141 (S.D. N.Y. 1977), "... the court is not free to blink away the common awareness that zeal for security is among the most common varieties of official excess."

So, in considering whether a prisoner is being denied his due process rights under the Fifth or Fourteenth Amendments, his First Amendment rights, or the right, accorded by the Eighth Amendment, to be free of conditions that constitute cruel and unusual punishment, the courts must seek to determine what is reasonable under the circumstances at hand. In *Rochin v. California*, 342 U.S. 165, 170 (1952), Justice Frankfurter delivered a wise admonition to courts engaged in making these determinations:

"The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process."

Accordingly, I have sought to determine the issues here presented in light of the body of law that has developed by the decisions of other courts confronted with similar problems. In doing so, I have been impressed by Chief Justice Warren's observation in *Trop v. Dulles*, 356 U.S. 86, 100-

101 (1958), that “. . . the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” I hope also to take heed of an equally pertinent comment by Justice (then Judge) Blackmun that in considering problems of the type here concerned, “. . . broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable.” *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

One further consideration must be taken into account. Most of the inmates at the jail are pre-trial prisoners. They are there, not to receive punishment for their misdeeds, for their guilt has not yet been established. They are there because it has been deemed necessary to incarcerate them to insure their presence at trial. Thus, they are entitled to the least restrictive alternatives consistent with the purpose of their incarceration. *Brenneman v. Madigan*, 343 F. Supp. 128, 138 (N.D. Cal. 1972).

We now deal with the specific complaints.

Inadequacy of Cell Space. The jail normally confines more than five thousand inmates, a majority of whom occupy cells designed to hold four, six or eight men. The plaintiffs complain that these cells are so impermissibly small that they contain less than 25 square feet of floor space for each man, and that the larger part of this space is taken up by the bunks and toilet. The plaintiffs point out that such cell space is far less than the 40 square feet per inmate prescribed as a minimum by the California Minimum Jail Standards, 15 Cal. Adm. Code § 1081(d), and that several published judicial opinions have considered comparable, or even larger, space to be constitutionally inadequate. See, e.g., *Detainees of Brooklyn H. of Det. for Men v. Malcolm*, 520 F.2d 392, 398 (2d Cir. 1975) (20 square

feet); *Moore v. Janing*, 427 F. Supp. 567, 572 (D. Neb. 1976) (20 square feet); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 679 (D. Mass. 1973); *aff'd on other grounds*, 494 F.2d 1196 (1st Cir. 1974), *cert denied* 419 U.S. 977 (1974); *aff'd on other grounds*, 518 F.2d 1241 (1st Cir. 1975) (44 square feet). In *Gates v. Collier*, 390 F. Supp. 482, 486 (N.D. Miss. 1975), *aff'd on other grounds*, 525 F.2d 965 (5th Cir. 1976), Chief Judge Keady stated that "[w]e know from the undisputed evidence that generally accepted correctional standards require a minimum of 50 square feet of living area for each prison inmate."

Both from the testimony at the trial and from my personal inspection of the cell rows in the course of the September 23, 1977 visit, it is apparent to the court that the multiple occupancy cells in both the "old" and new sections of the jail and the general atmosphere in which they are located present poor examples of the civilized standards and concepts of dignity, humanity and decency to which Justice Blackmun made reference in *Jackson v. Bishop*, *supra*. The cells are much like those in the Hall of Justice Jail, as I pointed out in *Dillard v. Pitchess*, 399 F. Supp. 1225, 1231 (C.D. Cal. 1975), a case in which the living conditions there were held to be intolerable. However, the opinion in that decision made a significant comparison. Hall of Justice inmates were confined in their cells almost constantly. By contrast,

"... inmates at the Central Jail have several advantages not available to Hall of Justice prisoners, the most important of which are that they take their meals in a dining room and have daily use of shower rooms located at the ends of the cell modules. Also, one of several day rooms is frequently available to Central Jail prisoners, where they may sit at tables and play games or write or talk. A chapel that will accommodate

several hundred inmates is used for the presentation of occasional shows or musical entertainment, as well as regular church services."

The cells of the Central Jail are, indeed, small, but in view of the frequent and substantial periods of time that the inmates are allowed to be out of their cells, I am not able to conclude that the matter of the limited number of square feet of sleeping space per man presents a constitutional issue that requires immediate action. Matters discussed later in this memorandum present problems that may require substantial modifications in the system of allocating prisoners among the penal facilities of Los Angeles County. It is expected that any such adjustment ". . . will take into appropriate account the increasingly enlightened standards with respect to the living space that should be accorded each inmate." See, *Stewart v. Gates*, ___ F. Supp. ___, ___ (C.D. Cal. 1978).

The evidence at the trial disclosed the fact that from time to time a particular module becomes so crowded that there are more inmates than bunks. As a result, the "overflow" men are obliged to sleep on mattresses on the concrete floor of the cell or of the walkway that fronts a row of cells. As was indicated earlier in open court, I find this to be intolerable. "If the public, through its judicial and penal system, finds it necessary to incarcerate a person, basic concepts of decency, as well as reasonable respect for constitutional rights, require that he be provided a bed." *Stewart v. Gates*, *supra*, at page _____. An order to such effect will be included in the judgment that will implement this memorandum.

Visitation. The plaintiffs complain that an inmate at the jail is separated from his visitor by a transparent glass partition and must use a "telephone" for voice communication. The defendants respond by emphasizing that to permit contact visits would increase the risks of physical harm, escape

and importation of drugs and other contraband. They point out that the measures that would have to be taken to guard against such risks, including strip searches and greatly increased supervision, would make it impossible for the jail to accommodate the more than two thousand visits per day that are now being accorded.

It is evident that to allow unrestricted contact visitation would add greatly to the Sheriff's security problems and reduce the numbers of allowable visits. On the other hand, it is equally obvious that the ability of a man to embrace his wife and his children from time to time during the weeks or months while he is awaiting trial is a matter of great importance to him. The problem that confronts us here was well expressed by Judge Lasker in *Rhem v. Malcolm*, 371 F. Supp. 594, 605 (S.D. N.Y. 1974); *aff'd* 507 F.2d 333 (2d Cir. 1974);

"There can be no doubt that the necessity of assuring security must be balanced against the right to humane treatment of prisoners, and that if contact visits are incompatible with that need they must be sacrificed. The critical question is whether the two can coexist."

It seems to me that a reasonable balance can be struck between these two valid considerations of security and prisoners' rights. Under the classification process that the Sheriff has established and is now implementing, within two weeks after an inmate arrives at the jail, the staff has learned enough about him to make a tentative evaluation as to whether he presents a security threat from the standpoints of being escape prone or drug oriented or otherwise, and he is classified accordingly. It is my understanding that a substantial proportion of the inmates are given a low risk classification in these respects. As to them, the dangers to security would appear not to be sufficient to justify depriving them of all physical contact with their loved ones, bearing in mind the

supervision and post-visit searches that the custodial staff would administer.

In order that the additional processing not overburden the prison staff and thus curtail the total number of visits that it could reasonably handle, a qualified inmate might be limited in the number of contact visits that he might receive. At the outset, one visit per week might be appropriate, subject to modification in light of experience.

The evidence at trial indicated that most of the inmates remain at the jail less than one week. By restricting the contact visits to those who have been in the jail for two weeks and have received other than a high risk classification, and by imposing limits upon the frequency of their visits, it would appear that the numbers of such visits would be reasonably manageable.

Counsel for the defendants has advised that Biscailuz Center probably will be fully reactivated shortly as a place of pretrial detention. In such event, it is assumed that it will house a substantial number of low risk inmates that otherwise would be kept in the Central Jail. If this occurs, it will further ease the problem of according contact visits in the Central Jail, and the court would expect that this type of visitation would be established at Biscailuz Center.

This court is hopeful that the above described tentative proposal can enhance considerably the goal of treating the inmates with reasonable humanity without unduly increasing the problems of security. Any order implementing these comments concerning the allowance of contact visits will be withheld pending a further opportunity for the parties to express their views and suggestions. A hearing for that purpose will be scheduled shortly after the filing of this memorandum.

Under the present arrangement, 228 visitors are accommodated at one time in separate "telephone" cubicles and

are allowed to remain twenty minutes. The defendants point out that the visiting facilities are in use twelve hours per day throughout the week; that 63,000 visitors are accommodated each month; and that logistical problems necessitate the twenty-minute limitation in order to accommodate the large numbers of weekly visits that are desired. The plaintiffs urge that this is too short a time and they seek to show that hour long visits could be accomplished without reducing the numbers of people that could be served.

It is evident that the Sheriff and his staff fully recognize the value of visitation, and they are to be commended for the attention and effort that they devote to accommodating such a large number of people. I am unable to conclude that whether individual visitors should stay only twenty minutes or could be allowed more time raises a constitutional issue that requires the court to second guess the Sheriff in this matter.

Under present regulations, individuals under eighteen years of age are not admitted to the jail to visit an inmate unless they are accompanied by an adult. This means that a teenage person that is fully capable of coming to the jail alone would be unable to visit his or her father unless the mother or some other friend would be available to come along, a situation that, unfortunately, is not always the case. The reluctance of the Sheriff to open the jail to unaccompanied visits by children under any and all circumstances is understandable. Nonetheless, inmates should be permitted, upon prior request, to receive unaccompanied visits from their minor children.

Outdoor Recreation. Except for the corridors, or free-ways, that front the rows of cells, the only areas available for physical exercise are portions of the roof of both the original jail and the new addition. Under schedules worked out by custodial personnel, prisoners are allowed two and

one-half hours per week, at most, for recreation on the roof, in groups of about 130. This is considerably less than the daily outdoor exercise of one hour that several federal courts have required as a minimum. See, e.g., *Mitchell v. Untreiner*, 421 F. Supp. 886, 901 (N.D. Fla. 1976); *Campbell v. McGruder*, 416 F. Supp. 100, 105 (D. D.C. 1975); *Conklin v. Hancock*, 334 F. Supp. 1119, 1122 (D. N.H. 1971).

Neither citation of legal authorities nor testimony of experts is needed in order to convince this court of the importance of regular outdoor exercise to the physical health and emotional well being of the men (particularly the young men) that make up the jail population. Clearly, they should have at least an hour for such purpose each day. The defendants do not challenge this. However, they understandably point out that the limited size of the rooftop areas available, the succession of complex routines that occur within the jail each day, and the logistical problems of controlling and moving large numbers of prisoners back and forth to the roof, limit substantially the opportunity for outdoor recreation.

The rooftop program was newly inaugurated at the time of trial, and the jail officials have had insufficient opportunity to assess the extent to which it reasonably can be expanded. Under all of the circumstances, including the defendants' apparent good faith desire to provide for adequate recreation, I am of the view that one hour per day should be considered a goal, rather than a constitutionally mandated minimum. The court will retain jurisdiction in order to assess the progress toward such goal. In the meantime, all prisoners, including those considered "high power" and those in administrative segregation, must be allowed not less than two and one-half hours of roof recreation per week.

The roof of the new portion of the jail provides a reasonably large open expanse. But the defendants have substantially ruined it as a place for basketball and other team sports by installing upright lengths of steel pipe every twenty-seven feet throughout the floor surface. These uprights support steel "eye-beams" that, along with the eighteen feet high perimeter wall, support the heavy wire screen that covers the entire area. The top of the wall on two sides is about eighty feet above the ground that abuts it; on the third side the roof of the Inmate Reception Center is about thirty feet below the top of the wall.

Custodial personnel assert that the screen is necessary in order to counteract the risk of someone from the outside throwing a weapon over the wall and into the recreation area, and to prevent escape over the wall with the aid of a jail-made "grappling hook" and line or a suddenly formed human pyramid.

Here is one instance in which it seems to me that the concern for security has resulted in an exaggerated response. If the jail authorities were to put their minds to the matter, I am sure that they could find ways to remove all or most of those posts that so seriously diminish the adequacy of the roof for physical exercise, and still keep the escape and assault risks under reasonable control. Such study and consequent readjustment will be required.

Indoor Recreation. The plaintiffs complain that inmates are allowed insufficient time to use the day rooms or to "stretch their legs" by walking back and forth along the walkways ("freeways") that extend across the front of each row of cells. The defendants refer to a new program that began at about the time of trial under which all inmates, other than those of maximum security classification, have considerably increased use of the day rooms and freeways. Maximum security inmates are given access to the freeway

on a limited basis. Inasmuch as they are considered generally to be assault prone, they are not allowed in the day rooms and are escorted whenever they must be in areas where other people are present. The defendants appear to be heading voluntarily and appropriately in the direction of allowing as much day room and freeway time as scheduling problems and reasonable security considerations will allow. Therefore, no order in this respect is presently indicated.

The day rooms once had television sets, but as they became inoperative because of internal malfunction or vandalism they were removed and not restored. Without implying any endorsement of the quality of most of the daytime television programs, it is obvious that people that are confined derive considerable recreational value from them. The jail authorities have agreed to reestablish television in the day rooms promptly. They should do so.

The plaintiffs complain of unconstitutional discrimination because inmates that agree to work, and thus become trustees, are given more privileges than are other prisoners. They may enter and leave their cells at will, have virtually unrestricted access to a day room and many other areas of the jail, and may attend weekly movies. I do not find such discrimination improper. Many menial chores must be performed regularly if the jail is to operate. In order to induce inmates to work at these tasks, the Sheriff is entitled to "hold out the carrot" of certain privileges that from a practical standpoint could not, or constitutionally need not, be accorded the general jail population. This is all that has occurred here.

Windows. A prisoner does not catch even a glimpse of the outside world throughout his entire time of confinement in the jail, other than the portion of the sky that he can see during his limited recreational periods on the roof. Thus, a man may go for many months without even seeing a bush

or a tree or any human activity outside the jail. This was not always so. When the building was constructed, in about 1963, it contained perimeter windows of transparent "unbreakable" glass. Thus, prisoners in the exterior cells or mess halls or day rooms had a bit of sunlight and outside view. However, within a short period of time, inmates succeeded in destroying several of these "unbreakable" windows, either through vandalism or in fruitless escape attempts. The defendants responded by replacing all of the windows with solid sheets of steel.

In *Rhem v. Malcolm*, 432 F. Supp. 769, 778 (S.D. N.Y. 1977), Judge Lasker held that to confine inmates so that they cannot see "the sun, sky or outside world" is a constitutional deprivation. This court agrees. Of course, as is recognized at the outset of this memorandum, constitutional rights must be limited by the reasonable requirements of security. But the conclusion is inescapable that this is another example of the response being more extreme than the danger against which it was directed.

Based upon visual observation, the lowest bank of windows is about twenty feet above the ground, and those of the next floor are about ten feet higher. In parts of the jail, the windows are immediately accessible to a person standing on the floor. In other places, they are much harder to reach. For example, along the upper tiers of the cells, a person would need considerable agility, dexterity and time in order to traverse the four-foot wide and very deep gap between the walkway and the wall in which the windows are set, maintain himself in a position to try to break a window, succeed in such attempt, and get through the opening.

I do not claim expertise in assessing the extent of the ingenuity of a prisoner determined to try to escape, nor am I aware of all of the appropriate means of frustrating such attempts. But when consideration is given to the vigilance

and care with which inmates are watched and supervised, the heights of the windows above the ground, the possibility of satisfactory fire resistant unbreakable glass being available,* and, in any event, the ability to bar and/or screen windows, this court is simply unable to conclude that the need to guard against occasional benighted escape attempts warrants depriving all inmates of any view of the outside world. To liken the jail, in its present condition, to one of those infamous dungeons of medieval days would be unfair, because the jail is well ventilated and reasonably well lighted. But the action in sealing up the place was a step in the wrong direction.

Processing For Court. On each court day, between 700 and 1,000 inmates are transported by bus to twenty-six courts scattered throughout the broad expanse of Los Angeles County. These prisoners are awakened at about 4:20 a.m., and, after being given breakfast, they are escorted to the Inmate Reception Center located in the same building complex as is the jail. Most of the men arrive there at about 5:30 a.m. and are distributed promptly among the more than thirty holding cells, each of which holds inmates bound for a particular court.

The holding cells are about fourteen feet by fourteen feet in linear dimension, and the only furnishing is a toilet. The early arrivals in the cell are able to lie or sit on the concrete floor, but as more men are added this becomes increasingly difficult and finally impossible. On the morning of my visit, I counted about twenty-eight men in several of the cells, a condition of "standing room only." One cell, number 21, became jammed with so many occupants that I could not

*Witnesses for the defendants insisted that such glass does not exist, but I am not convinced as to the completeness of the search or the enthusiasm with which it was made.

count them. Finally, one of the deputies came and directed that about one-half of the men move to an adjacent cell that had been cleared. Twenty-two men responded to that order, and thereafter I was able to count at least thirty-two remaining occupants. The place still was excessively crowded.

The men remain in the holding cell for about an hour, and then, at about 6:15 a.m., the chaining process begins. The inmates from a particular holding cell form a line in the adjacent corridor. There they are handcuffed, and then the handcuffs of each four men are connected with a chain. The line thereupon moves gradually to the nearby parking lot and the men board the bus in such manner that two men of each group of four are seated immediately in front of the other two, with the connecting chain passing over the back of the seat that separates them. A little more than an hour after the start of the boarding process, the buses begin to roll, and the time of the ensuing trip ranges from a few minutes to more than an hour, depending upon the destination and traffic conditions.

At the end of the court day, between 4:00 and 7:00 p.m. (sometimes much earlier), the reverse process begins. After the return bus ride, a shakedown examination, another substantial wait in a holding cell, and the evening meal, the men finally are returned to their cells, usually by about 8:00 p.m., but sometimes considerably later.

Any procedure involving the transportation to court of a group of detainees that present varied security risks is necessarily a demeaning experience for the prisoners. This is one of the regrettable but unavoidable consequences of the need for pre-trial detention. But, bearing this in mind, I find the above described process to be constitutionally intolerable in two respects.

The first glaring problem is the holding cells. The sight of from twenty to fifty-four men being crammed into a

fourteen-foot cell is a repelling experience in any society that takes pride in its high concepts of human dignity. The closest comparison that I can draw to such a spectacle is that of an overcrowded pig pen. If the defendants find it necessary to detain an inmate in a holding cell before placing him on a bus, or after his return, they must at least give him a place to sit on a bench or a chair.

This requirement clearly will create a difficult problem for the defendants, as well as for the court. It is obvious that the forthcoming order will reduce greatly the numbers of men that the present holding cells can contain, and it is doubtful that the Inmate Reception Center, as presently constructed, has space available for additional cells. On the one hand, considerations of constitutional rights and basic decency require that these dehumanizing conditions of holding cell detention be changed immediately. On the other hand, the Sheriff has been ordered by competent judicial authority (both state and federal) to move large numbers of prisoners back and forth to the various courts every day, and I cannot reasonably stop the present process in its tracks. The defendants must be given a minimum reasonable time within which to propose a solution that will make prisoners available to the courts and still treat them as human beings.

The second constitutional problem perceived in the present system for getting inmates to court is even more difficult. For a man to be subjected to the above described process that begins at 4:20 a.m. and ends at 8:00 p.m., or later, is inherently an exhausting and emotionally draining experience. To go through it once is bad enough; but to be obliged to repeat it for several successive days, or even weeks, while he is a defendant on trial, is believed to be constitutionally intolerable. Due process can hardly be accorded a defendant that is so worn out by the above described procedure that he lacks the alertness to help his attorney or to try to "put

his best foot forward" in the presence of the trier of fact. The defendants in this case will be required to modify substantially the present procedure in order to avoid subjecting inmates on trial to such daily trauma.

It is true that most of the inmates go to court in custody only once or twice, because their cases are dismissed, or non-custodial sentences are imposed, or they are granted bail, or they plead guilty and are returned to court only for sentencing. But it is largely the fact that the Sheriff must transport so many men such long distances one or two times that makes it difficult for him to deal more reasonably with the prisoners that are undergoing trial.

As is indicated earlier in this memorandum, to be subjected even once or twice to the present process of busing large numbers of prisoners back and forth to outlying courts is emotionally draining and dehumanizing. Nonetheless, defendants in custody must be brought before the court, and if this is the only reasonable procedure, with respect to prisoners not then undergoing trial, it scarcely can be challenged as unconstitutional. But the inherent need to haul so many men so far for purposes other than trial is far from evident, and if a reasonable and more humane alternative is available, the constitutional rights of the inmates entitle them to it.

On the morning that I was present to view the process, thirty-two large and obviously very expensive six-wheel buses, each controlled by two deputy sheriffs and filled with inmates, left the parking lot. From casual conversation, it appeared evident that most of these men were scheduled for arraignment or for other purposes not requiring the presence of witnesses. It is not readily apparent why all judicial processes involving defendants in custody, other than trial and sentencing after trial, could not be performed in court-

rooms constructed within, or immediately adjacent to, the Central Jail.* To the extent that locally assigned judges could not properly handle such calendars, it would be far less expensive and cumbersome for the Sheriff to transport one or more judges from an outlying courthouse to the jail than to bus a large number of prisoners to any such outlying court. One possibility worth considering is to establish and operate a system of closed circuit television as a means of conducting non-trial judicial procedures. This alternative would appear to be less expensive and far less arduous than busing many hundreds of prisoners all over the county every day. And, finally, if the governmental bodies of Los Angeles County remain determined that all phases of the criminal process shall continue to be handled in the outlying areas, they will be obliged to house their prisoners much closer to the respective courthouses.

Once the large "non-trial" proportion of inmates that make up the laborious collection and distribution program are eliminated therefrom, the court days can begin for prisoners currently on trial at a much more reasonable hour; the use of holding cells can be substantially reduced or perhaps even eliminated; and most of the large and expensive buses would not be needed. A reasonable time will be accorded the defendants within which to propose plans that will permit the processing of detainees going to court in a manner more closely in harmony with that in which a civilized society should deal with its prisoners.

However, as a matter of due process, no such delay can be tolerated with respect to inmates currently on trial. Beginning forthwith, on each day of trial after the first day, such inmates will be required to leave their beds not earlier

*A large unoccupied portion of one floor apparently could provide space for several modest courtrooms.

than 6:00 a.m.; they will not be confined in holding cells, either before leaving for court or following their return; their waiting time on the buses at the jail will not exceed thirty minutes; and they will be returned to their cells no later than 8:00 p.m. An order to such effect will so provide.

Telephones. Evidence at the trial disclosed that the numbers of pay telephones in the cell blocks are insufficient to accommodate within a reasonable time inmates desiring to make calls. The public need to keep a person in custody pending trial does not justify cutting off his access to the outside world. He must be allowed to communicate by telephone with members of his family, or with anyone else he chooses, at all reasonable times. *O'Bryan v. County of Saginaw, Michigan*, 437 F. Supp. 582, 599 (E.D. Mich. 1977).

The defendants opposed any thought of increasing telephone access at the jail by pointing to the relatively high incidence of coin cheating or fraudulent reference to credit cards attributable to telephones presently there. Reasonable supervision and monitoring by the jail authorities should be able to limit somewhat this abuse, and the telephone company has or can find ways of forestalling "credit card" calls from a particular telephone. In any event, occasional abuse cannot justify an "across the board" denial or limitation of telephone access.

An adequate number of telephones should be sufficiently proximate to the modules that each of the inmates desiring to use them may make at least one call per day. The defendants will be required to propose plans for the appropriate numbers and locations of additional telephones.

Cell Searches. Jail authorities conduct "shakedown" inspections of the cells at irregular intervals in search of contraband or other items not allowed in the cells, such as food or excessive clothing or reading material. The defen-

dants insist that these searches are accomplished with minimum disruption of the inmates' possessions. The plaintiffs paint quite a different picture. They contend that their property is left in disarray; that items are unnecessarily removed and destroyed; and that valuable property is taken without a receipt being given. In *United States ex rel Wolfish v. Levi*, 439 F. Supp. 114, 149 (S.D. N.Y. 1977), Judge Frankel said, with respect to the identical problem:

"Allowing inmates to observe from a reasonable distance the searching of their rooms would go far to eliminate these grounds of complaint. An officer viewed by the owner is more likely to fulfill the stated duty to put things back as they were. The claim of stolen property is far less likely to be made, the grounds for suspicion, or ostensible suspicion, being largely obviated. Having one's things searched is no pleasure in the best of circumstances. Being denied the right even to watch the invasion is a blunt oppression."

This court agrees. Future shakedowns should be made while the respective inmates remain outside their cells but near enough to observe the process and raise or answer any relevant inquiry.

Time For Meals. One of the grievances most frequently expressed by inmates that testified at the trial was that they were given insufficient time within which to eat their meals in the dining halls. The same contention was made before this court in the trial of the case of *Stewart v. Gates*, — F. Supp. — (C.D. Cal. 1978), which involved the Orange County Jail. The comments made in that decision are equally applicable here and are incorporated accordingly:

"The court is sympathetic with the security concerns of the jail administrators when large numbers of inmates are congregated in a limited space in the presence of a relatively few unarmed deputies, which is what

occurs during the serving of meals, and I agree that such instances should not be prolonged more than necessary. However, mealtime is an important occasion to a prisoner, and he should be entitled to savor his food, along with a bit of conversation, rather than be obliged to eat in a hurried atmosphere. An inmate should be allowed not less than fifteen minutes at the meal table, and an order will be issued accordingly." (— F. Supp. — at —).

Clothing And Laundry. Under California law, as implemented by the Sheriff's Department Custody Division Manual, an inmate's mattress cover, towel, socks, undergarments and outergarments are required to be exchanged for clean items at least once each week. As of the time of trial, this had not been occurring with regularity. Inmates reported having worn the same denim pants and shirts for as much as a month or more, and such testimony was eloquently confirmed by the appearance of their garments. Some inmates have washed their clothing in the toilet or while taking a shower and have dried the items as best they could. The defendants assured the court that the shortage of clothing for exchange was due to a temporary logistics problem that soon would be corrected. The court is willing to assume that this is so.

However, a once per week change of clothing for prisoners has been held to be completely inadequate in a growing number of federal cases. *See*, for example:

Alberti v. Sheriff of Harris County, Texas, 406 F. Supp. 649, 677 (S.D. Tex. 1975) (daily exchange required);

Mitchell v. Untreiner, 421 F. Supp. 886, 898 (N.D. Fla. 1976) (daily exchange required);

Martinez Rodriguez v. Jimenez, 409 F. Supp. 582, 596 (D. P.R. 1976), *aff'd on other grounds*, 537

F.2d 1 (1st Cir. 1976); 551 F.2d 877 (1st Cir. 1977) (semi-weekly access to laundry required);

Hamilton v. Landrieu, 351 F. Supp. 549, 553 (E.D. La. 1972) (uniform laundry twice a week);

Inmates of Henry Cty. Jail v. Parham, 430 F. Supp. 304, 307, 308 (N.D. Ga. 1976) (laundry twice a week; clean uniform three times per week).

An inmate must be permitted at least twice per week to receive clean outergarments, undergarments, socks and a towel in exchange for those that he has been using. An order will be made to that effect.

Law Library For Pre-Trial Detainees. Pre-trial detainees representing themselves ("pro pers") have regular use of an adequate law library in the jail. Another law library, on the second floor, is available to sentenced prisoners. A third law library, purportedly quite inferior to the other two, may be used by pre-trial prisoners with appointed or retained counsel. If they desire to use the second floor library, they must seek the permission of the Legal Sergeant.

This jail official testified that the second floor library is relatively small and quite fully utilized by sentenced prisoners, and that he grants requests from others only if the applicant "... seems sincere and able to make use of it, rather than someone who is looking to use it just as an excuse to get out of their module for a while." He estimates that of the forty to fifty-five inmates that use the library each night, about fifteen are pre-trial prisoners who are there pursuant to permission.

The plaintiffs contend that the pre-trial detainees are entitled to unrestricted reasonable access to the second floor library. I am not able to agree. These inmates have counsel representing them in the pending proceedings, and they can supplement or second guess the work of their counsel with the help of the limited library available to them. If they can

show a legitimate reason why exhaustive research by them is necessary, they are accorded the use of the larger library. If they are refused a request for more extensive library facilities in order to prepare litigation challenging conditions at the jail, their attorneys can help with such litigation or at least assist them in gaining access to the better library. In addition, the jail has an arrangement with Southwestern University under which its law students, supervised by law professors, provide legal assistance to inmates regarding civil matters.

In light of all of these circumstances, plus the constant availability of "jailhouse lawyers", it is concluded that the "access to the courts" provided to inmates at the jail is fully in compliance with the requirements expressed in *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.*, *Younger v. Gilmore*, 404 U.S. 15 (1971), and in *Bounds v. Smith*, 430 U.S. 817 (1977).

Brutality, Harassment And Abuse. The plaintiffs contend that the deputy sheriffs on duty at the jail regularly use excessive force in enforcing their orders, commit unprovoked assaults, inflict verbal abuse upon the prisoners, and generally conduct a "reign of terror" at the jail. Much of the trial was devoted to hearing testimony of alleged victims of, or witnesses to, such improper conduct, and to hearing the deputies' versions of such incidents.

Controversies of this kind are extremely difficult to resolve. On the one hand, the deputies have a most difficult job. Their obligation is to maintain control and enforce discipline under circumstances in which the use of some force occasionally is needed on a snap judgment basis. And yet, the deputies are obliged to treat inmates with reasonable courtesy despite the vilification frequently directed toward them and the constant threat of physical harm under which they work. When they respond reasonably to situations that

require immediate action, they must be upheld even though reflection in the calmness of the courtroom might lead to the conclusion that a softer response would have been preferable.

On the other hand, it is well known that there are such things as "badge happy" and sadistic custodial officers. And the courts, as well as jail administrators, have an obligation to protect inmates against them.

After evaluating the evidence as best I could, it seems clear that there is no "reign of terror" at the jail that requires court intervention. It is obvious that in some instances the deputies used excessive force upon an inmate that they believed to have been "out of line". But for the most part, the deputies that testified at the trial and those that I observed in the course of my visits to the jail impressed me as having an enlightened attitude concerning their obligation to be respectful of the sensibilities of their prisoners.

However, the record at trial did disclose that the inmates frequently were annoyed by excessive and sometimes insulting use of the loudspeakers by the deputies in charge of the modules. It is noisy enough in the modules without the deputies making unnecessary announcements or subjecting the inmates to uncalled for monologues. Such conduct is contrary to directives by the Sheriff, but it nonetheless is recommended that he give a renewed and emphatic reminder to all module deputies that misuse of the "intercom" will not be tolerated.

Cost Of Compliance. This court is well aware that compliance with portions of this decision will require some capital expenditures and increased operational costs. The court regrets this and is fully sympathetic with the budgetary problems faced by the County of Los Angeles, particularly in the present atmosphere of Proposition 13. Unfortunately,

however, these budgetary problems cannot be used to defeat the changes mandated by this decision.

If state authorities, on behalf of the public, authoritatively determine that it is necessary to incarcerate a person in the county jail, such determination carries with it the obligation to pay the cost of maintaining that person in harmony with such of his constitutional rights as are consistent with incarceration. In other words, he must be housed and fed and clothed and otherwise treated as a human being. In the judgment of the court, the requirements of this decision go no farther, and they must be enforced accordingly.

Implementing Judgment. Some of the actions envisaged by this memorandum of decision will require a reasonable amount of time for planning and preparation. The court would prefer to prepare the judgment implementing this memorandum after consultation with counsel in order that the time schedules contained therein may take into appropriate account the problems that will be involved. Accordingly, a judgment will be withheld pending further hearing scheduled for *Monday, August 14, 1978, at 2:00 p.m.*

DATED: July 25, 1978.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

3. Constitutional and Statutory Provisions.

United States Constitution, Amendment 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28.

§1343. Civil rights and elective franchise.

The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.
- (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
- (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

§2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202. Creation of remedy.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

United States Code, Title 42.

§1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§1985(3). Conspiracy to interfere with civil rights.

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the

laws, or for the purpose of preventing or hindering the constituted authorities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Office-Supreme Court, U.S.

FILED

DEC 22 1983

ALEXANDER L. STEVAS,

No. 83-317

IN THE

Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK,

Petitioners,

vs.

DENNIS RUTHERFORD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOINT APPENDIX.

FREDERICK R. BENNETT,
Principal Deputy County Counsel,
Los Angeles County Counsel's
Office,
500 West Temple Street,
Suite 648,
Los Angeles, Calif. 90012,
(213) 974-1880,

Counsel for Petitioners.

FRED OKRAND,
JOHN H. HAGAR, JR.,
ACLU Foundation of
Southern California,
633 S. Shatto Place,
Los Angeles, Calif. 90005,
(213) 487-1720,

Counsel for Respondents.

PETITION FOR CERTIORARI FILED August 23, 1983
CERTIORARI GRANTED November 7, 1983

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF PARTS OF THE RECORD,
JOINT APPENDIX.

<u>Item</u> <u>No.</u>	<u>Date</u>	<u>Court</u>	<u>Description</u>	<u>Location*</u>
1.			Relevant Docket Entries in Courts Below	JA-1
2.	5/14/76	USDC	Plaintiff's Second Amended Complaint	JA-10
3.	7/6/76	USDC	Defendants Answer to Second Amended Complaint	JA-34
4.	6/27/77	USDC	Pretrial Conference Order	JA-51
5.	7/25/77	USDC	Stipulation	JA-91
<p>The following documents (except item no. 11, which is contained herein) have been reproduced in the petition for certiorari, and are not reproduced herein. Location references are to the Petition for Certiorari Appendix ("PA").</p>				
6.	7/25/78	USDC	Reported Memorandum Opinion, 457 F.Supp. 104 (C.D. Cal. 1978)	PA-41
7.	2/15/79	USDC	Unreported Supplemental Memorandum Opinion	PA-29
8.	2/15/79	USDC	Judgment	PA-37
9.	8/8/80	USCA	Unreported Opinion	PA-17
10.	5/18/81	USDC	Unreported Memorandum Decision	PA-23
11.	5/18/81	USDC	Judgment	JA-93
12.	7/14/81	USCA	Opinion	PA-1

*"JA" references are to the Joint Appendix.

Relevant Docket Entries.

<i>Date</i>	<i>Court</i>	<i>Entry</i>
12/9/75	USDC	Complaint filed.
3/23/76	USDC	Order certifying class action and requiring distribution of notice to class filed.
5/14/76	USDC	Second amended complaint filed.
7/6/76	USDC	Defendants' answer to second amended complaint filed.
2/1/77	USDC	Plaintiffs' motion for partial summary judgment/preliminary injunction and affidavits in support filed.
2/23/77	USDC	Plaintiffs' amended motion for partial summary judgment preliminary injunction filed.
2/25/77	USDC	Defendants' affidavits in opposition to motion for preliminary injunction/summary judgment filed.
3/14/77	USDC	Order denying plaintiffs' motion for partial summary judgment/preliminary injunction filed.
6/27/77	USDC	Pretrial conference order filed.
7/25/77	USDC	Stipulation and order that affidavits submitted at the hearing on the preliminary injunction may be admitted into evidence as the direct testimony of the affiant in lieu of direct testimony.
8/2/77	USDC	Court trial (1st day).
8/3/77	USDC	Court trial (2d day).
8/4/77	USDC	Court trial (3rd day).

<i>Date</i>	<i>Court</i>	<i>Entry</i>
8/5/77	USDC	Court trial (4th day).
8/10/77	USDC	Court trial (5th day).
8/11/77	USDC	Court trial (6th day).
8/12/77	USDC	Court trial (7th day).
8/23/77	USDC	Court trial (8th day).
8/30/77	USDC	Court trial (9th day).
8/31/77	USDC	Court trial (10th day).
9/1/77	USDC	Court trial (11th day).
9/2/77	USDC	Court trial (12th day).
9/13/77	USDC	Court trial (13th day).
9/15/77	USDC	Court trial (14th day).
9/21/77	USDC	Court trial (15th day).
9/22/77	USDC	Court trial (16th day).
9/23/77	USDC	Court trial (17th day). Court orders post trial briefing.
10/31/77	USDC	Plaintiffs' post trial brief and appendix thereto filed.
12/5/77	USDC	Defendants' post trial brief and attachments thereto filed.
12/15/77	USDC	Plaintiffs' post trial brief and appendix thereto filed.
7/25/78	USDC	Memorandum of decision filed; judgment held pending hearing schedule for 8/14/78.
8/14/78	USDC	Final judgment filed; court orders matter continued to 8/28/78 for further proceedings.
8/23/78	USDC	Defendants' motion to modify judgment filed; defendants' return to courts memorandum decision and summary of progress towards implementation filed; defendants' motion for reconsideration or a stay pending appeal on certain issues filed.

<i>Date</i>	<i>Court</i>	<i>Entry</i>
8/28/78	USDC	Hearing on defendants' motion for reconsideration/and to stay proceedings pending appeal. Court orders a stay pending appeal re: contact visits/window replacement; orders matter set for further hearing on 10/17/78.
10/11/78	USDC	Defendants' statement of reasons for non-compliance with certain provisions of courts memorandum decision filed.
10/13/78	USDC	Court trial, further evidentiary hearing or issue of jail procedures.
11/8/78	USDC	Court trial, further evidentiary hearing on contact visits, etc.
11/9/78	USDC	Court trial, further evidentiary hearing.
11/10/78	USDC	Court trial, further evidentiary hearing. Post trial briefing schedule ordered.
11/27/78	USDC	Defendants' opening brief on contact visits, search procedures filed.
12/11/78	USDC	Plaintiffs' reply brief and attachments re: contact visits search procedures filed.
12/13/78	USDC	Defendants' supplemental brief re: contact visits, searches filed.
12/20/78	USDC	Defendants' reply brief re: contact visitation; cell searches filed.
12/21/78	USDC	Plaintiffs' declaration in response to defendants' supplemental brief re: contact visits, searches filed.

<i>Date</i>	<i>Court</i>	<i>Entry</i>
1/18/79	USDC	Court's memorandum to counsel re: further hearing filed.
1/29/79	USDC	Defendants' motion for suspension of portions of injunction pending appeal filed.
2/5/79	USDC	Minute order granting defendants' motion to suspend portions of injunction pending appeal; defendants' ordered to submit order modifying courts' order.
12/15/79	USDC	Supplemental memorandum of decision, judgment filed. Court orders stay of paragraphs (2)(b), 5 suspended per FRCP 62(e) on certain conditions; request for stay of provisions of paragraph 8 denied, except that provisions of paragraph 7 shall be suspended for 30 days to permit defendants to seek a further stay.
2/16/79	USDC	Defendants' notice of appeal to USCA from 2/15/79 judgment filed (USCA docket no. 79-3061). Defendants' designation of record on appeal filed (USCA docket no. 79-3061)
3/15/79	USDC	Plaintiffs' designation of additional documents to be transmitted filed (USCA docket no. (USCA docket no. 79-3061)
3/19/79	USDC	Order staying provisions of paragraph 8 of district courts judgment re: cell searches pending further order of court. (USCA docket no. 79-3061)

<i>Date</i>	<i>Court</i>	<i>Entry</i>
4/4/79	USDC	Order staying paragraph 8 of district court's judgment (USCA docket no. 79-3061)
4/30/79	USDC	Filed reporter's transcript of proceedings held on 8/2/77 Vol. 1, 8/3/77 Vol. 2, 8/4/77 Vol. 5, 8/11/77 Vol. 6, 8/12/77 Vol. 7, 8/23/77 Vol. 8, 8/30/77 Vol. 9, 8/31/77 Vol. 10, 9/1/77 Vol. 11, 9/2/77 Vol. 12, 9/13/77 Vol. 13, 9/14/77 Vol. 14, 9/21/77 Vol. 15, 9/22/77 Vol. 16, 9/23/77 Vol. 17, 9/28/78 Vol. 18, 10/13/78 Vol. 19, 11/8/78 Vol. 20, 11/9/78 Vol. 21, 11/10/78 Vol. 22, (USCA docket no. 79-3061)
5/25/79	USDC	Judgment and order awarding plaintiffs' attorneys fees and costs.
6/22/79	USDC	Defendants' notice of appeal to USCA from judgment of 5/25/79. (USCA docket no. 79-3367)
7/5/79	USDC	Defendants' designation of reporter's transcript (USCA docket no. 79-3367).
10/24/79	USDC	Original of reporter's transcript of proceedings held on 4/23/79 filed (USCA docket no. 79-3367).
12/6/79	USDC	Defendants'/appellants' designation of clerk's records on appeal filed (USCA docket no. 79-3367).
1/8/80	USDC	Plaintiffs' designation of documents filed (USCA docket no. 79-3367)

<i>Date</i>	<i>Court</i>	<i>Entry</i>
8/8/80	USCA	Memorandum opinion re consolidated appeals from judgments of 2/15/79 and 5/25/79 (USCA docket nos. 79-3061 & 79-3367)
9/4/80	USDC	Memorandum opinion of USCA (USCA docket nos. 79-3061 & 79-3367)
10/20/79	USDC	Mandate from USCA ordered filed and spread (USCA docket nos. 79-3061 & 79-3367)
4/22/81	USDC	Memorandum decision of USDC filed; order awarding plaintiffs attorneys' fees and costs filed.
4/23/81	USDC	Court's memorandum to counsel filed.
4/28/81	USDC	Defendants' notice of appeal from judgment of 4/22/81 filed. (USCA docket no. 81-5364)
5/18/81	USDC	Memorandum of decision and judgment reaffirming judgment entered 2/15/79 filed.
5/28/81	USDC	Order staying judgment of 5/18/81 filed.
5/29/81	USDC	Defendants' notice of appeal from judgment of 5/18/81 filed. Defendants' designation of reporters' transcript on appeal (USCA docket no. 81-5461)
6/25/81	USDC	Judgment awarding plaintiffs attorneys' fees.
7/6/81	USDC	Defendants' notice of appeal from judgment of 6/25/81 and designation of reporters transcript filed. (USCA docket no. 81-5617)

<i>Date</i>	<i>Court</i>	<i>Entry</i>
8/7/81	USDC	Original reporter's transcript of proceeding held on 5/18/81 filed.
8/21/81	USCA	USCA order consolidating appeals in docket no. 81-5617 and 81-5364; permitting use of transcripts and excerpt from previous appeals, docket nos. 79-3061 and 79-3367, but excerpts are to be updated; appeal in docket no. 81-5461 to proceed independently.
12/16/81	USDC	Court awards plaintiffs attorneys' fees.
1/21/82	USDC	Plaintiffs' notice of appeal from order of 12/16/81 filed. (USCA docket no. 82-5071)
1/22/82	USDC	Plaintiffs' designation of reporter's transcript filed (USCA docket no. 82-5071)
1/26/82	USDC	Original reporter's transcript of proceedings held on 2/24/81 filed.
2/12/82	USDC	Defendants' report re: compliance with court's order filed.
2/18/82	USDC	Original reporter's transcript of proceedings held on 11/23/81 filed.
5/15/82	USDC	Original reporter's transcript of proceedings held on 9/2/80, Vol. 1, 9/3/80 Vol. 2, 11/5/81 Vol. 3, 2/24/81 Vol. 4-A, 2/24/81 Vol. 4, 2/24/81 Vol. 4-B, 2/25/81 Vol. 5-A, 2/25/82 Vol. 5-B, 2/26/81 Vol. 6-A, 2/26/81 Vol. 6-B, filed.

<i>Date</i>	<i>Court</i>	<i>Entry</i>
2/19/82	USDC	Original reporter's transcript for proceedings held on 5/14/81, 5/15/81, 5/18/81, and 5/22/81 filed.
6/3/82	USDC	Stipulation and order re record on appeal. USCA docket no. 82-5071 filed.
7/16/82	USDC	Plaintiffs' designation of record on appeal filed (USCA docket no. 82-5071)
8/5/82	USDC	Plaintiffs' designation of record on appeal filed. (USCA docket no. 82-5071)
9/31/82	USDC	Defendants' designation of record on appeal filed. (USCA docket no. 82-5071)
11/5/82	USDC	Clerk's record on appeal forwarded to USCA along with reporter's transcript of 9/2/80 Vol. 1, 9/3/80 Vol. 2, 11/5/80 Vol. 3, 2/24/81 Vol. 3, 2/24/81 Vol. 4A, 2/24/81 Vol. 4B, 2/25/81 Vol. 4B, 2/11/77 Vol. 5B, 2/26/81 Vol. 6, 2/26/81 Vol. 6A, 8/12/77 Vol. 6B, 8/23/77 Vol. 7, 8/30/77 Vol. 8, 8/31/77 Vol. 9, 9/1/77 Vol. 10, 9/2/77 Vol. 11, 9/13/77 Vol. 12, 9/14/77 Vol. 13, 9/21/77 Vol. 14, 9/22/77 Vol. 15, 9/23/77 Vol. 16, 8/28/78 Vol. 17, 8/29/78 Vol. 18, 11/8/78 Vol. 19, 11/9/78 Vol. 20, 11/10/79 Vol. 21, 5/14/81 Vol. 22, 5/14/81, 5/18/81, 5/22/81, 11/23/81, and 9/5/80.

<i>Date</i>	<i>Court</i>	<i>Entry</i>
7/14/83	USCA	Opinion of USCA (USCA docket no. 81-5461)
8/12/83	USDC	Opinion of USCA lodged. (USCA docket no. 81-5461)

**Second Amended Complaint for
Declaratory and Injunctive Relief.**

United States District Court, Central District of California.

Dennis Rutherford, Harold Taylor, Richard Orr, Gregory Armstrong, Jack Jones and William Robles, on behalf of themselves and all others similarly situated, Plaintiffs, vs. Peter J. Pitchess, as Sheriff of the County of Los Angeles, William Anthony, as Assistant Sheriff of the County of Los Angeles, Walter Howell, as Chief of the Corrections Division of the Los Angeles County Sheriff's Department, James White, as Commander of the Los Angeles County Central Jail, Edward Edelman, Kenneth Hahn, James Hayes, Peter Schabarum and Baxter Ward, as Supervisors of the County of Los Angeles, Jack Holt, Jack E. Robbins, Ernest Zansler, John Johnson, as Los Angeles County Sheriff's Department Lieutenants assigned to the Los Angeles County Jail, James D. Austin, Leroy K. Johnson, Gerald Boswell, Jerry Exline, Richard Hendershot, James Cinderelli, David Betkey, Danny Calhoun, Robert Chrisman, Steven Crawford, Dan Dohner, John Fehrs, Steven Gayhart, Antonio Samaniego, Randall Sisk, Frederick Sykes, John Wargo and Frederick Weise, as Los Angeles County Sheriff's Department officers assigned to the Los Angeles County Central Jail, on behalf of themselves and all others similarly situated, Dr. Arman Toomajian, as Los Angeles County Sheriff's Department Medical Director, Drs. Patrick Lavelle, Donald Verin and Wetzal, as doctors employed by the Los Angeles County Sheriff's Department and assigned to the Central Jail, on behalf of themselves and all others similarly situated, and Messrs. Carnette, Davis and Taylor, as nurses employed by the Los Angeles County Sheriff's Department and assigned to the Central Jail, on behalf of themselves and all others similarly situated, Defendants. Case No. CV 75-4111-WPG.

Filed: May 14, 1976.

SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF.
(Civil Rights Act).

JURISDICTION

1. This is a class action for a declaratory judgment that Plaintiffs' constitutional rights are being violated by the conditions of their confinement in the Los Angeles County Central Jail and for a permanent injunction preventing Defendants from continuing to violate sentenced and unsentenced prisoners' rights while acting under color or law.

2. Jurisdiction is conferred on this Court under 28 U.S.C. §1343 providing for jurisdiction over claims arising under 42 U.S.C. §1983 and §1985, and 28 U.S.C. §2201 and 2202 relating to declaratory judgments. The Court has pendent jurisdiction to adjudicate claims arising under California law.

PARTIES

3. Plaintiffs are residents of the United States and the County of Los Angeles, State of California and are incarcerated at the Los Angeles County Central Jail, (hereinafter referred to as the "Central Jail" or the "Jail"), located at 441 Bauchet Street, Los Angeles, California.

4. Plaintiffs Dennis Rutherford, Harold Taylor, Gregory Armstrong and Williams Robles are charged with offenses under the law of California and are awaiting trial in the Superior or Municipal Courts for the County of Los Angeles, State of California. In their criminal cases, bail has been set by a Judge of those courts. Due to their indigency, they have been unable to make bail and are incarcerated at the Jail solely to insure their appearance at trial and for no other reason. Plaintiff Rutherford was thus

incarcerated from November 5, 1972 to February 23, 1976; plaintiff Taylor has been thus incarcerated since December 17, 1973; plaintiff Armstrong has thus been incarcerated since October 5, 1975; and plaintiff Robles was thus incarcerated starting December 17, 1975. Said plaintiffs are presumed innocent and are incarcerated solely to insure their presence at trial.

7. Defendant Peter J. Pitchess is, and at all times herein relevant has been, the Sheriff of the County of Los Angeles, California, and keeper of the Jail pursuant to California Government Code Section 26505 and Penal Code Sections 4000 and 4005, and as such is charged with the duty of maintaining and operating the Central Jail and promulgating and enforcing rules for the governance and safekeeping of prisoners incarcerated at the Central Jail and for the supervision of Deputy Sheriffs in the Los Angeles County Sheriff's Department.

8. Defendant William Anthony is, and has been at all times herein relevant, an Assistant Sheriff in the Los Angeles County Sheriff's Department in charge of the Sheriff's Department Custody Division, and as such is responsible for maintaining and operating county jail facilities, including the Central Jail, and promulgating and enforcing rules for the care and treatment of prisoners at the Jail.

9. Defendant Walter Howell has succeeded John P. Knox and is not the Chief of the Los Angeles County Sheriff's Department Custody Division and as such is responsible for maintaining and operating County jail facilities, including the Central Jail, and for promulgating and enforcing rules for the care and treatment of prisoners at the Jail.

10. Defendant James White is, and was at all times relevant herein, a Captain of the Los Angeles County Sheriff's Department and the county official directly responsible

for the administration of the Central Jail.

11. Jack Holt, Jack E. Robbins, Ernest Zansler and John Johnson are lieutenants of the Los Angeles County Sheriff's Department and as such supervise, manage and administer the Jail.

12. James D. Austin, LeRoy K. Johnson, Gerald Boswell, Jerry Exline, Richard Hendershot, James Cinderelli, David Betkey, Danny Calhoun, Robert Chrisman, Steven Crawford, Dan Dohner, John Fehrs, Steven Gayhart, Antonio Samaniego, Randall Sisk, Frederick Sykes, John Wargo and Frederick Weise are Los Angeles County Sheriff's Department officers assigned to the Jail and as such control and govern the everyday operations of the Jail and the lives of prisoners. These defendants are representative of a class, within the meaning of Rule 23, Federal Rules of Civil Procedure, consisting of all Los Angeles County Sheriff's Department officers below the rank of lieutenant assigned to the Jail. This class (hereinafter referred to as Defendant Class I) is ongoing and includes all Los Angeles County Sheriff's Department officers below the rank of lieutenant who are or will be in the future assigned to the Jail.

13. Dr. Arman Toomajian is the Los Angeles County Sheriff's Department Medical Director and as such is the county official directly responsible for prisoner medical care in the Jail.

14. Drs. Patrick Lavelle, Donald Verin, and Wetzel, whose first name is unknown, are doctors employed by the Los Angeles County Sheriff's Department and assigned to the Jail and as such are responsible for providing prisoners with medical care. These defendants are representatives of a class, within the meaning of Rule 23, Federal Rules of Civil Procedure consisting of all doctors employed at the

Jail. This class (hereinafter referred to as Defendant Class II) is ongoing and includes all doctors who are or will be in the future assigned to the Jail.

15. Messrs. Carnette, whose first name and badge number are unknown, Davis, whose first name is unknown but whose badge number is 41, and Taylor, whose first name and badge number are unknown, are nurses employed by the Los Angeles County Sheriff's Department and assigned to the Jail and as such are responsible for providing prisoners with medical care. These deendants are representative of a class, within the meaning of Rule 23, Federal Rules of Civil Procedure, consisting of all nurses employed at the Jail. This class (hereinafter referred to as Defendant Class III) is ongoing and includes all nurses who are or will be in the future assigned to the Jail.

16. Defendant classes I, II and III are proper for the following reasons:

(a) The members of the defendant classes are so numerous that joinder of all of them is impracticable;

(b) The members of the defendant classes are readily identifiable from the defendants' records;

(c) There are questions of law and fact common to the defendant classes;

(d) The claims and defenses of the representative defendants are typical of the claims and defenses of their classes;

(e) The named defendants will fairly and adequately protect the interests of their classes;

(f) The prosecution of separate actions by plaintiffs and their class against individual members of the defendant classes would create the risk of inconsistent and incompatible adjudications;

(g) Adjudications against the representative defendants would as a practical matter be dispositive of the interests of the defendant classes and would substantially impair and impede the ability of the defendant classes to protect those interests.

17. Defendants Edward Edelman, Kenneth Hahn, James Hayes, Peter F. Schabarum, and Baxter Ward are, and at all times relevant herein have been, Supervisors of the County of Los Angeles, California, and as such responsible for the maintenance and operation of the jails within said County, including the Central Jail, and are responsible for the welfare of the inmates of these jails and for the control of persons, including defendants named in paragraphs 7 through 10 herein assigned to operate said jails. Defendant Supervisors constitute the governing board of the County of Los Angeles and are responsible for the allocation of funds for all county purposes, maintenance of County jails not excluded.

18. All the individual defendants as well as the County of Los Angeles shall hereinafter be referred to collectively as "defendant", which term shall be used to mean defendants and each of them, unless otherwise specified:

19. Defendants and each of them are, and at all times herein mentioned have been, the agents, servants and employees of one another, and in doing the acts and maintaining the conditions herein complained of, are and have been acting within the course and scope of said agency and employment.

20. In doing all the acts and omissions, and in maintaining the conditions, herein described, defendants, and each of them, separately and in concert, have been and are acting under color of the statutes, ordinances, regulations, custom and usages of the State of California and the County of Los Angeles. Said acts and omissions were committed

and conditions were maintained by defendants personally and through actions of their agents and subordinates, acting pursuant to instructions from defendants.

21. Other agents, servants and employees of defendant Pitchess, not specifically named herein, work at the Central Jail and carry out the directions and policies of defendant Pitchess. These agents, servants and employees of defendant Pitchess shall hereinafter be referred to as "officers", the term by which they are referred to within the Jail. Included within the scope of their employment is the care, treatment and control of prisoners at the Jail.

STATEMENT OF THE CASE

22. Defendants deny plaintiffs adequate contact with the general community by doing the following:

(a) Opening, reading and censoring all prisoners' mail to and from attorneys and others;

(b) Limiting the time, frequency and duration of prisoners' personal visits;

(c) Prohibiting physical contact during prisoners' personal visits and prohibiting conjugal visits;

(d) Denying prisoners and their visitors privacy and surveilling conversations during visits;

(e) Requiring visitors to wait in line long periods of time before visits and treating visitors in a rude manner;

(f) Denying pretrial prisoners night visits;

(g) Denying prisoners direct access to telephones to make outgoing calls;

(h) Prohibiting prisoners from receiving incoming telephone calls; and

(i) Prohibiting prisoners from receiving through the mail or from visitors newspapers, magazines, books, reading matter and other such forms of written communication from

the outside world.

23. Defendants deny plaintiffs the opportunity to personally consult with their attorneys in privacy. Attorney-client communications take place in an area, mislabeled the "attorney room," which often becomes crowded and which is simultaneously used by law enforcement officers, parole and probation officers, bailbondsmen and clergy. As a consequence, interviews between prisoners and attorneys lack adequate privacy, particularly during busy daytime hours; and conversations can be and are overheard by others in the room.

24. Defendants deny pretrial prisoners access to an adequate law library, legal materials and adequate opportunity to communicate in person or by telephone with counsel and do not permit prisoners to receive from outside the Jail any legal material, unless by Court order.

25. Defendants deny plaintiffs adequate opportunity to physically exercise themselves, recreate and entertain themselves and thus subject plaintiffs to excruciating boredom. Pretrial prisoners are completely denied any opportunity to exercise or recreate outdoors, are allowed out of their cells for exercise only one hour per day, if at all, are only infrequently permitted the use of the day rooms and are totally without access to television, movies and live entertainment.

26. The Jail's reading library is inadequate, and pretrial prisoners have only indirect access to that library by a cart that comes through pretrial prisoners housing areas about once each two weeks.

27. Defendants subject prisoners going to Court to a harsh, exhausting routine which jeopardizes their right to a fair trial. On days they go to court prisoners are awakened between 3:45 a.m. and 4:00 a.m.. They then spend their days in crowded holding areas in the Jail, on buses to and

from the Courts and in holding tanks at the courts. During this time they are not provided adequate meals. Prisoners are frequently returned to the Jail from court at 8:00 p.m. and even as late as after midnight, thereby getting little sleep before the next day's courts appearance.

28. Defendants routinely confiscate plaintiff's personal belongings, including but not limited to correspondence and photographs.

29. Defendants deny plaintiffs an adequate opportunity to obtain from family and friends or to purchase at the Jail commissary necessities and amenities of life such as soap, toothbrush, toothpaste, comb, deodorant, paper, pencils, and reading matter; and defendants fail to provide indigent prisoners with such items.

30. Defendants deny plaintiffs adequate opportunity to bathe on a daily basis. Pretrial prisoners in particular are herded into overcrowded shower areas where they must bathe 10 men per shower head.

31. Defendants deny plaintiffs sufficient time to eat their meals and provide pretrial prisoners with only spoons to eat their meals.

32. Prisoner housing at the Jail consists of cells designed for one, two, four or six men. Lighting in all cells is inadequate for reading and is controlled from outside the cells by Jail officers. The two, four and six men cells are not furnished with any chairs, stools, tables or desk areas. All areas occupied by prisoners are windowless and without a view to the outside world.

33. The physical conditions of plaintiffs' confinement constitutes a health threat in that the Jail lacks proper heating and ventilation and defendants fail to take adequate measures to preserve sanitation and to prevent the spread of contagious diseases. Cells for pretrial prisoners, designed

for two, four or six men are overcrowded and frequently extra prisoners are assigned to such cells and required to sleep on the floor. Toilets are located inside the cells, and prisoners must eliminate body wastes in the immediate presence of their cellmates.

34. Both medical care and routine health care at the Jail are, when available at all, inadequate, and usually characterized by a callous disregard for the well-being of prisoners and for the basic tenets of sound medical practice. The standards of medical care at the Jail are well below those generally accepted as adequate in Los Angeles County or the State of California. Defendants do not provide adequate preventive and diagnostic medical services to prisoners upon admission to the Jail. All prisoners already in the Jail are unnecessarily exposed to dangerous medical and/or contagious conditions that new prisoners might possess; and consequently, their lives and health are needlessly impaired. Defendants seize all medicine, drugs, pills, orthopedic appliances and some eyeglasses from prisoners upon admission to the Jail, even though such medication or devices may be lawfully prescribed and necessary to maintain the prisoners' life and health during chronic illnesses, such as epilepsy; and as a result newly admitted prisoners often suffer seizures or great discomfort and other adverse effects resulting from sudden deprivations of such medication or devices. Prisoners who manage to get medication while in the Jail often receive inappropriate and inadequate substitutes for seized prescription medications. Medication usually is distributed to prisoners at hours convenient to defendants and not to the medical needs of the prisoner, and prisoners often receive no medication at all when they are away from the Jail in Court. Medical care when given is frequently grossly inadequate and inappropriate.

35. Nursing personnel at the Jail are engaged in the unauthorized practice of medicine in violation of the law of California in that said nurses without adequate supervision make decisions whether to treat prisoners and/or whether to refer prisoners to a doctor.

36. Many unconvicted prisoners admitted to the Jail are drug addicts, and suffer withdrawal symptoms shortly after admission to the Jail. Defendants are well aware of this fact. Although they are required to do so by California Health and Safety Code §11222, Defendants make little or no attempt to provide prisoners under their care, whom they have reasonable cause to believe are addicted to controlled substances, with medical care necessary to ease symptoms of withdrawals from those substances.

37. Psychologists or psychiatrists are not available to give routine care to prisoners. Prisoners who are "diagnosed" as having psychological problems by Jail officers are "treated" with isolation. Supervision of mentally disturbed prisoners is inadequate, and little or no medical or psychological treatment is provided for them. No attempt is made to transfer mentally ill prisoners to more appropriate facilities. As a result mentally disturbed prisoners often commit suicide in the Jail.

38. Defendants' rules and regulations which govern operation of the Jail and the actions and practices of officers are not posted throughout the Jail and are not made available to all prisoners. Those rules and regulations which are available to some inmates are printed solely in English; and Defendants' method of publishing is to post them in only some parts of the Jail. Thus, many prisoners are ignorant of the Jail's rules and regulations; and in particular, Spanish-speaking prisoners are often totally unaware of their existence or content. Moreover, many of these "published" rules are unconstitutionally vague — giving no adequate

notice of the conduct they are intended to prevent — and are selectively enforced by defendants. Other rules are enunciated by officers on an *ad hoc* basis, frequently after an "offense" has allegedly occurred. These "rules" vary from officer to officer, according to his mood and/or feelings toward the prisoners involved.

39. Defendants impose punishment upon prisoners for violations of Jail rules without notice, hearing or opportunity for prisoners to speak on their own behalf or otherwise contest the charges against them. No standardized punishments exist for violation of either written or unwritten rules. Instead, penalties, like rules, are applied on an arbitrary *ad hoc* basis. Penalties are not necessarily limited to the alleged offender. Sometimes an entire housing area of prisoners is punished for an infraction allegedly committed by one of their number. Punishments include, but are not limited to, withdrawal of privileges, forced labor and solitary confinement. All punishments may be levied for an indefinite period of time.

40. For purposes of discipline and so-called administrative segregation, defendants place many prisoners in abysmal housing areas known as "The Hole" and "Siberia" and in other housing areas utilized for segregation and isolation.

41. The defendants govern plaintiffs' lives with a reign of terror, the principal ingredient of which is a widespread pattern and practice of unprovoked assaults of prisoners by Jail officers. Many jail officers under defendants' supervision are inexperienced in corrections and psychologically unsuited for work as correctional officers because the Sheriff's Department is primarily an investigative and police agency and its employees, including Jail officers, receive little or no training in corrections. Moreover, the most inexperienced officers are assigned to duty at the Jail. Their

inexperience and psychological unfitness often cause them to perform the acts or omissions complained of herein which result in harm to the plaintiffs as hereinafter elaborated.

42. Defendants maintain or permit conditions in the Jail and follow practices which they know or have reason to know are deleterious to the physical and mental well-being of the prisoners for whose health they are responsible. The brutality, and indifference perpetrated on prisoners by defendants and their employees and the resultant mental anguish suffered by plaintiffs ensure that plaintiffs will suffer mental illness or severe distress as a result of confinement in the Jail.

43. Defendants' treatment of unconvicted prisoners is incredibly egregious in view of the fact that convicted prisoners in the Jail, in other Los Angeles County jail facilities and in California and Federal prisons, are treated considerably better than unconvicted prisoners in the Jail. Although the lives of convicted prisoners are far from idyllic, convicts do not face the same oppressive confinement and boredom experienced by the Jail's unconvicted prisoners. Convicts generally live in superior housing and have daily opportunity to exercise, recreate, entertain themselves and bathe.

FIRST CLAIM FOR RELIEF: SUMMARY PUNISHMENT OF PRETRIAL PRISONERS WITHOUT DUE PROCESS OF LAW.

44. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 43, inclusive.

45. Pretrial detainees are presumably innocent and for the most part are confined in lieu of bail, which they are too poor to afford, to ensure their attendance at trial. Yet defendants inflict upon these prisoners conditions, restrictions and constraints which individually and in the aggregate

constitute summary punishment without even a semblance of due process of law in contravention of 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the United States Constitution.

SECOND CLAIM FOR RELIEF: *DENIAL TO PRETRIAL PRISONERS OF EQUAL PROTECTION OF LAW.*

46. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 43, inclusive.

47. Most pretrial prisoners are detained only because they are financially unable to post bail. By contrast, wealthier persons awaiting trial who can afford to post bail are not incarcerated or subjected to the conditions which these plaintiffs experience. Wealthier persons have, *inter alia*, unrestricted access to counsel; the opportunity to do legal research and to contact witnesses; the opportunity to obtain proper rest and nutrition and to maintain their physical and emotional health so that they can effectively assist in preparation of their trials and appear as effective witnesses for themselves. Defendants have denied and will continue to deny all these rights to pretrial prisoners solely because of their poverty.

48. Defendants, by committing the acts, omissions and practices complained of in this claim for relief are depriving pretrial prisoners of equal protection of the laws in violation of 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF: *PREJUDICE TO A FAIR TRIAL.*

49. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 43, inclusive.

50. The physically and psychologically oppressive conditions at the Jail impair unconvicted prisoners' mental and

physical health so that they cannot be effective witnesses for themselves or assist in preparing their defenses, and upon plaintiffs' information and belief, cause many unconvicted prisoners to plead guilty to avoid further confinement in the Jail. Inadequate sleep, hours on buses going to and from court, crowded holding tanks and very little food render many unconvicted prisoners listless and unable to assist or understand their defense.

51. The conditions to which presumably innocent prisoners awaiting trial are subjected in the Jail, as well as the restrictions placed on their access to counsel and to the courts undermine the integrity of the entire trial process and infringe on unconvicted prisoners' rights to a fair trial thereby depriving these prisoners of rights guaranteed them by 42 U.S.C. §1983 and the Fifth, Sixth, Seventh and Fourteenth Amendments to the Constitution of the United States.

FOURTH CLAIM FOR RELIEF: DENIAL OF ACCESS TO COUNSEL AND TO THE COURTS.

52. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 22, inclusive, and 27.

53. Defendants restrict prisoners' access to courts and to counsel and to the effective assistance of counsel by, among other things:

- (a) Restricting prisoner-attorney mail;
- (b) Restricting and censoring prisoner mail to and from courts;
- (c) Refusing to allow private attorney-prisoner interviews in the attorney room;
- (d) Refusing to permit prisoners phone calls to attorneys, investigators and witnesses;
- (e) Subjecting prisoners to an exhausting routine on court days.

54. Defendants further deny pretrial prisoners access to the courts and their rights to assist counsel in preparing a defense by making it impossible for prisoners to prepare legal documents or assist counsel in legal research due to inaccessibility of law books or to locate and prepare witnesses due to the restrictions on communications.

55. Defendants' actions, practices, policies and omissions in restricting and/or denying prisoners their constitutionally protected rights of access to the courts and to counsel and to petition for the redress of grievances deprive plaintiffs of rights secured them by 42 U.S.C. §1983 and the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

FIFTH CLAIM FOR RELIEF: *DENIAL OF RIGHTS OF EXPRESSION, COMMUNICATION AND ASSOCIATION.*

56. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 22, inclusive, and 28.

57. Defendants censor the flow of communication to and from prisoners and effectively isolate prisoners from the outside world in contravention of plaintiffs' rights guaranteed them by 42 U.S.C. §1983 and the First, Fourth and Fourteenth Amendments to the United States Constitution.

SIXTH CLAIM FOR RELIEF: *DENIAL OF DUE PROCESS IN DISCIPLINARY AND ADMINISTRATIVE PROCEEDINGS.*

58. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 43, inclusive.

59. Defendants mete out discipline to all prisoners and in effect subject pretrial prisoners to punitive, high security classification in a capricious manner without the rudiments of fundamental fairness, namely prior notice of what con-

stitutes a disciplinary infraction and what punishments attach, prior notice of and opportunity for a prompt hearing before an impartial tribunal at which hearing the accused may be represented by counsel or counsel substitute, confront adverse witnesses, and present favorable evidence, and a reasoned decision with findings based on the evidence. Defendants' failure to provide these procedural protections denies plaintiffs due process of law as guaranteed by 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments of the United States Constitution.

SEVENTH CLAIM FOR RELIEF: *CRUEL AND UNUSUAL PUNISHMENT.*

60. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 43, inclusive.

61. The conditions, restrictions and constraints, individually and in the aggregate, suffered by prisoners at the hands of defendants constitute cruel and unusual punishment in contravention of plaintiffs' rights under 42 U.S.C. §1983 and the Eighth and Fourteenth Amendments to the United States Constitution.

EIGHTH CLAIM FOR RELIEF: *INADEQUATE MEDICAL CARE.*

62. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 21, inclusive, and 34 through 37 inclusive.

63. Defendants provide plaintiffs with inadequate, superficial care in violation of plaintiffs' rights to due process of law secured to them by 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the United States Constitution.

NINTH CLAIM FOR RELIEF: VIOLATIONS OF CALIFORNIA LAW.

64. Plaintiffs incorporate herein by reference the allegations contained in paragraphs 1 through 22, inclusive, 28 and 34 through 37, inclusive.

65. Defendants deny plaintiffs their right to make two phone calls within three hours of booking guaranteed by California Penal Code §851.5.

66. Defendants confiscate plaintiffs' personal property without providing a receipt in violation of California Penal Code §4003.

67. Defendants fail to provide plaintiffs care and treatment by a physician 24 hours per day and deny plaintiffs treatment by their private physicians in violation of California Penal Code §4023.

68. Jail nurses are engaged in the unauthorized practice of medicine, in violation of California Business and Professions Code, §§2141, 2392 and 2726.

69. Defendants fail to provide prisoners who are addicted to controlled substances with medical treatment necessary to ease the symptoms of withdrawal in violation of California Health and Safety Code §11222.

DECLARATORY JUDGMENT

70. An actual and substantial controversy exists between Plaintiffs and Defendants, in that Plaintiffs complain that Defendants are violating and will continue to violate their most fundamental rights under the United States Constitution and the laws and statutes of the United States and California and commit acts and omissions threatening Plaintiffs' lives and health. Defendants have persisted in subjecting Plaintiffs to unconstitutional and harmful conditions despite protests by the Jail's prisoners. Defendants may in the future make minor changes in the Jail from time to time

in response to protests but they will do nothing substantial to remedy the unconstitutional and harmful conditions to which they subject Plaintiffs or to change the policies and procedures. Defendants deny that their actions are illegal or unconstitutional or cause injuries to Plaintiffs.

INJUNCTIVE RELIEF

71. All of the conditions and practices separately and in the aggregate make incarceration in the Jail severe, punitive and restrictive. The Plaintiffs are now suffering and will continue to suffer irreparable injury as a direct and proximate result of the conditions and practices herein alleged and are without a plain, speedy, adequate remedy at law in that:

(a) Money damages will not adequately compensate Plaintiffs for denial of their Civil Rights or for time confined in the Jail pursuant to pretrial detention under conditions that could be successfully challenged in the Courts.

(b) Plaintiffs are psychologically and physically harmed and damaged; and unconvicted prisoners are induced to plead guilty to criminal charges pending against them in order to avoid the conditions and practices herein described which exist at the Jail.

(c) Money damages for Plaintiffs' injuries are extremely difficult to calculate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray:

1. That the Court certify this action as a class action.
2. That the Court personally view the Los Angeles County Central Jail to gain assistance in rendering a ruling.
3. That the Court enter judgment declaring that defendants, and each of them, through the individual and collective acts, practices, and omissions complained of herein,

have subjected and are subjecting plaintiffs to:

a. Summary punishment without due process of law in contravention of 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the United States Constitution as enumerated in Plaintiffs' First Claim for Relief;

b. Denial of equal protection of law in contravention of 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution as enumerated in Plaintiffs' Second Claim for Relief;

c. Prejudice to fair trial in contravention of 42 U.S.C. §1983 and the Fifth, Sixth, Seventh and Fourteenth Amendments to the United States Constitution as enumerated in Plaintiffs' Third Claim for Relief;

d. Denial of access to counsel and the Courts in contravention of 42 U.S.C. §1983 and the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution as enumerated in plaintiffs' Fourth Claim for Relief;

e. Denial of Rights of Expression, Communication and Association in contravention of 42 U.S.C. §1983 and the First, Fourth and Fourteenth Amendments to the United States Constitution as enumerated in plaintiffs' Fifth Claim for Relief;

f. Denial of due process in disciplinary and classification proceedings in contravention of 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the United States Constitution as enumerated in plaintiffs' Seventh Claim for Relief;

g. Cruel and unusual punishment in contravention of 42 U.S.C. §1983 and the Eight and Fourteenth Amendments to the United States Constitution as enumerated in plaintiffs' Seventh Claim for Relief;

h. Denials of adequate medical care in contravention of 42 U.S.C. §1983 and the Fourteenth Amendment to the

United States Consitution as enumerated in plaintiffs' Eighth Claim for Relief;

i. Violations of California Penal Code §§851.5, 4003, 4023, Business and Professions Code §§2141, 2392 and 2726 and Health and Safety Code §11222 as enumerated in plaintiffs' Ninth Claim for Relief;

4. That the Court issue preliminary and permanent injunctions assuring that pretrial prisoners are accorded all of the rights and privileges of the innocent; and that all prisoners not be subjected to cruel and unusual punishment and not denied their other constitutional and statutory rights. More specifically, the Plaintiffs should be assured by the plan, *inter alia*:

a. That the prisoners be accorded essential preventive medical care and receive adequate and sound medical, psychiatric and dental health care;

b. That prisoners addicted to controlled substances be accorded with reasonable medical care to ease the symptoms of withdrawal.

c. That a regular recreational and exercise program, outside of the cells, be expanded and that all prisoners be allowed outdoors for sufficient periods to insure their continuous physical and mental well being;

d. That the Jail and its prisoners living areas therein be kept in a safe and healthy condition, with proper heating, ventilation and provisions for sanitation;

e. That pretrial prisoners be accorded private and adequate living space in one man cells with reasonable lighting and furnishings.

f. That defendants be enjoined from placing pretrial prisoners in overcrowded cells and from requiring some pretrial prisoners to sleep on the floor.

g. That all prisoners be provided suitable and sufficient time to eat in accordance with recognized nutritional needs and be provided with knife, fork and spoon as utensils.

h. That education and vocational work programs be established;

i. That the prisoners have continuous opportunity to talk and associate with each other, for legitimate purposes including but not limited to socializing.

j. That the prisoners be entitled to receive through the United States Mail or from visitors and retain books, magazines, newspapers, law books and legal materials and be provided with direct access to adequate reading and law libraries;

k. That visiting conditions be established which assure decency, comfort, privacy of conversations, conjugal rights, and visiting periods of adequate duration and frequency.

l. That no limitations be placed on persons an inmate may see, communicate with and receive communications from;

m. That no censorship be executed on incoming or outgoing mail, newspapers, books and periodicals; that the only control on incoming mail be for the inspection of contraband such as drugs or weapons.

n. That adequate phones be installed so that prisoners have access to them in order to make local, outgoing calls without charge and to receive incoming calls, and that such phones not be wiretapped or monitored in any manner;

o. That a reasonable code of intra-jail behavior providing for inmates rights to be promulgated in English and Spanish and provided for each prisoner upon entry to the jail;

p. That no discipline or classification of inmates be instituted without first affording them notice, the assistance

of counsel and counsel substitute, the confrontation of accusers, the right to cross-examine adverse witnesses, a written decision containing reasons therefor and evidence relied upon, and hearing before an impartial tribunal;

q. That prisoners be protected from unprovoked assaults by Jail officers;

r. That defendants be enjoined from assigning inadequately trained, rookie officers to the Jail.

s. That plaintiffs be assured of adequate opportunity to bathe every day;

t. That all prisoners, including the indigent, have reasonable opportunity to obtain life necessities and amenities.

u. That all prisoners have the opportunity to obtain adequate rest and sleep before and during times they appear in court and that all prisoners going to court not be awakened earlier than 6:00 a.m. and not be returned to the Jail later than 6:00 p.m.

v. That prisoners have the opportunity to privately and confidentially communicate with their attorneys in a room provided by defendants for that purpose.

w. That prisoners be allowed to retain in reasonable quantities their personal belongings, including, but not limited to, correspondence and photographs.

x. That Jail living areas be humanized and provided with reasonable furnishings and windows to the outside world.

5. That if a satisfactory plan cannot be submitted and implemented, the Defendants be enjoined and restrained from incarcerating or detaining any and all prisoners in the Jail and further enjoined from transferring prisoners to an alternative facility unless Defendants can provide evidence satisfactory to the Court that the alternative does not suffer from the conditions herein complained of and that it is

accessible to visitors and counsel.

6. That the Court retain jurisdiction over Defendants until such time that the Court is satisfied that the practices, policies, acts and omissions alleged herein no longer exist and will not reoccur.

7. That the Court award reasonable attorneys' fees and costs of suit herein to plaintiffs.

8. That the Court award such other relief as may be necessary and proper.

Respectfully submitted,

/s/ Terry Smerling

TERRY SMERLING

Attorney for Plaintiffs

(Declaration of Service omitted in printing).

Answer to Second Amended Complaint.

United States District Court, Central District of California.

Dennis Rutherford, et al., Plaintiffs, vs. Peter J. Pitchess, et al., Defendants. No. CV 75-4111 WPG.

Filed: July 6, 1976.

Defendants PETER J. PITCHESS, as Sheriff of the County of Los Angeles, WILLIAM ANTHONY, as Assistant Sheriff of the County of Los Angeles, WALTER HOWELL, as Chief of the Custody Division of the Los Angeles County Sheriff's Department, JAMES WHITE, as Commander of the Los Angeles County Central Jail, JACK HOLT, JACK E. ROBBINS, ERNEST ZANSLER, as Los Angeles County Sheriff's Department Lieutenants assigned to the Los Angeles County Jail, JAMES D. AUSTIN, LEROY K. JOHNSON, GERALD BOSWELL, RICHARD HENDERSHOT, JAMES CENDERELLI, DANNY CALHOUN, STEVEN CRAWFORD, JOHN FEHRS, STEVEN GAYHART, ANTONIO SAMANIEGO, FREDERICK SYKES, JOHN WARGO and FREDERICK WEISE, as Los Angeles County Sheriff's Department officers assigned to the Los Angeles County Central Jail, DR. ARMAN TOOMAJIAN, as Los Angeles County Sheriff's Department Medical Director, DRS. PATRICK LAVELLE, and FREDERICK WETZEL, as doctors employed by the Los Angeles County Sheriff's Department and assigned to the Central Jail, and MR. CHARLES DAVIS, R.N., MR. GENE GARNETT, and MR. DONALD TAYLOR employed by the Los Angeles County Sheriff's Department for themselves alone and for no other defendant and in the capacity sued herein and in no other capacity, in answer to the Second Amended Complaint in the above-entitled action, admit, deny and affirmatively allege as follows:

1. These answering defendants deny paragraphs 1 and 2 of the Second Amended Complaint in the above-entitled action.

2. In answer to the allegations contained in paragraph 3 of the above-entitled complaint, these answering defendants have insufficient information and belief to enable them to answer the allegations of said paragraph, and basing their denial on that ground deny each and every allegation contained therein.

3. In answer to the allegations contained in paragraph 4 of the complaint in the above-entitled action, these answering defendants have insufficient information to enable them to answer the allegation that Dennis Rutherford, Harold Taylor, Gregory Armstrong and William Robles are or were unable to make bail due to their indigency, and basing their denial on that ground deny such allegation. In further answer to the allegations contained in said paragraph 4, these answering defendants affirmatively allege that Dennis Rutherford, Harold Taylor, Gregory Armstrong and William Robles have other means of obtaining their release from jail, by seeking a reduction in the amount of their bail or by obtaining their release on their own recognizance. Moreover, defendants are informed and believe, and therefore allege that since the time that this action was brought, plaintiffs Dennis Rutherford and William Robles have obtained their release from jail by posting bail or by other means. In further answer to paragraph 4, these defendants deny that Harold Taylor is in custody of the jail. In further answer to the allegations contained in said paragraph 4, these answering defendants affirmatively allege that the presumption of innocence is solely an evidentiary presumption available in a criminal trial and is such a presumption for no other purpose.

4. In answer to the allegations contained in paragraph 5 of the above-entitled complaint these defendants deny that Richard Orr and Jack Jones are currently serving sentences in the jail.

5. These answering defendants deny each and every allegation contained in paragraph 6 of the Second Amended Complaint in the above-entitled action. In further answer to the allegations contained in said paragraph 6, these answering defendants affirmatively allege: that plaintiffs and plaintiffs' attorney cannot fairly and adequately represent both a class of pre-trial inmates and a class of sentenced inmates as the interests of each class are different from and contrary to the interests of the other class in that in order to benefit one class, it may be necessary to take rights and benefits away from the other; that plaintiffs are not fairly and adequately representing the interests of the purported classes and subclasses in that they have failed to raise claims reasonably expected to be raised by members of the class and subclasses, such as claims for damages; that there is an insufficient community of interest to justify the maintenance of this action as a class action; that there are no significant or substantial benefits that will accrue to either the litigants or the courts in permitting this action to be maintained as a class action; and it is unnecessary and undesirable to permit the maintenance of a class action where only declaratory or injunctive relief is sought because of alleged facially invalid or unconstitutional practices or procedures or policies in that the determination of the questions of constitutionality or invalidity can be made by the court and determined to be valid or constitutional regardless of whether the action is treated as an individual action or a class action; and that the plaintiffs, and each of them, lack standing as to all of the issues alleged herein and that there is no existing actual case or controversy between the defendants and the plaintiffs and

their representatives have insufficient resources to properly prosecute this action on behalf of the alleged class and subclasses.

6. In answer to paragraph 11 in the above-entitled complaint these defendants deny that John Johnson presently supervises, manages and administers the jail.

7. In answer to paragraph 12 in the above-entitled complaint these defendants deny that Jerry Exline, David Betkey, Robert Chrisman, Don Dohner or Randall Sisk are assigned to the jail. In further answer these defendants deny that there is a Steven Gayhart assigned to the jail.¹ In further answer to paragraph 12 these defendants deny and affirmatively allege that the defendants named in paragraph 12 are representatives of a class within the meaning of Rule 23, Federal Rules of Civil Procedure. These defendants further allege that there is lacking a community of interest among the members of the purported class in that there are insufficient issues of law and fact common to these individuals and that the representatives will not fairly represent the interests of the class.

8. In answer to paragraph 14 in the above-entitled complaint these defendants deny and affirmatively allege that the defendants named in paragraph 14 are representatives of a class within the meaning of Rule 23, Federal Rules of Civil Procedure. In further answer to paragraph 14, these defendants deny that Dr. Donald Vernin is employed by the Los Angeles County Sheriff's Department.

9. In answer to paragraph 15 in the above-entitled complaint these defendants deny and affirmatively allege that the defendants named in paragraph 15 are representatives of a class within the meaning of Rule 23, Federal Rules of

¹There is an individual with that surname assigned however.

Civil Procedure. In further answer to paragraph 15, these defendants deny that Mr. Carnette and Mr. Davis are nurses.

10. In answer to paragraph 16 in the above-entitled complaint these defendants deny each and every allegation contained therein. In further answer to paragraph 16 these defendants allege: that it is unnecessary and undesirable to maintain this action as a class action where only declaratory or injunctive relief is sought because of alleged facially invalid or unconstitutional practices or procedures or policies in that the determination of the questions of constitutionality or invalidity can be made by the court and determined to be valid or constitutional regardless of whether the action is treated as an individual or class action; that some of the purported classes are not numerous within the meaning of Rule 23; that the membership of purported classes that extend into the future are not identifiable; that questions of whether individual members of the purported classes have deprived plaintiffs of their rights will depend on individual sets of facts and circumstances and that therefore there are insufficient questions of law and fact present for class treatment of these individuals; that the claims and defenses of the purported representative defendants will depend on individual sets of facts and circumstances and that therefore these claims and defenses are not typical of the claims and defenses of the purported classes; that the members of the purported classes are being subjected to guilt by association that may result in personal and professional injury without notice and an opportunity to be heard that their interests cannot be protected by named defendants selected by plaintiffs; and that there is no case or controversy between the defendants and plaintiffs on each of the issues purportedly put into issue herein.

11. In answer to the allegations contained in paragraph 17 of the Second Amended Complaint in the above-entitled

action, these answering defendants deny that defendants Edelman, Hahn, Hayes, Schabarum and Ward are responsible for the maintenance and operation of the jails within the County of Los Angeles or the Central jail, or that they are responsible for the welfare of the inmates of these jails. In further answer to the allegations of paragraph 17 of the Second Amended Complaint in the above-entitled action, these answering defendants deny that defendants Edelman, Hahn, Hayes, Schabarum and Ward are responsible for the control of persons assigned to operate said jails, including defendants named in paragraphs 7 through 15 of said complaint. In further answer to the allegations of said paragraph 17 these answering defendants affirmatively allege that the Board of Supervisors of the County of Los Angeles do not have control over the specialized or professional duties of County officers, such as the Sheriff of the County of Los Angeles, and cannot direct him to perform his lawful duties in any particular manner. In further answer to paragraph 17 these defendants allege that acts of defendants Edelman, Hahn, Hayes, Scharbarum and Ward in allocating funds do not give rise to a claim under the Civil Rights Act or state law.

12. In answer to paragraph 18 these defendants deny that the "County of Los Angeles" may be sued under 42 U.S.C. 1983 or 1985.

13. In answer to the allegations contained in paragraph 19 of the Second Amended Complaint in the above-entitled action, these answering defendants deny each and every allegation contained in said paragraph, and in further answer to the allegations of said paragraph, affirmatively allege that the defendants are employees of the County of Los Angeles, which is not a party to this action, and not employees of any of the defendants herein.

14. In answer to the allegations of paragraph 20 of the Second Amended Complaint in the above-entitled action, these answering defendants deny that they have done the acts and omissions or maintained the conditions, either separately or in concert, as alleged in said Second Amended Complaint, and further deny that any such acts were done personally or through the acts of agents or subordinates, whether such were acting alone or pursuant to instructions. In further answer to paragraph 20 these defendants allege that they are not subject to equitable or declaratory relief for any acts or omissions of their subordinates.

15. In answer to paragraph 21 of the above-entitled complaint these answering defendants deny each and every allegation contained therein.

16. In answer to paragraph 22 of the above-entitled complaint these answering defendants deny each and every allegation contained therein.

17. In answer to paragraph 23 of the above-entitled complaint these answering defendants admit that some law enforcement officers, some parole and probation officers and some bail bondsmen and some clergy are permitted to use the attorney room at Central Jail. In further answer to the allegations contained in paragraph 23 of the complaint in the above-entitled action, these answering defendants deny each and every other allegation contained in said paragraph which is not herein specifically admitted.

18. These answering defendants deny each and every allegation contained in paragraph 24 of the Second Amended Complaint in the above-entitled action.

19. In answer to the allegations contained in paragraph 25 of the Second Amended Complaint in the above-entitled action, these answering defendants admit that the roof exercise yard at Central Jail is not presently large enough to

permit most pretrial detainees outdoor exercise. In further answer to said paragraph, these answering defendants affirmatively allege that with the opening of the jail addition in the near future, pretrial detainees will be given outdoor recreation. In further answer to the allegations contained in said paragraph, these answering defendants admit that some pre-trial inmates are without access to television, movies, and live entertainment. In further answer to the allegations of said paragraph, these answering defendants deny each and every allegation contained in said paragraph which is not herein specifically admitted.

20. In answer to the allegations contained in paragraph 26 of the complaint in the above-entitled action, these answering defendants admit that a book cart containing books from the jail's reading library comes through pre-trial prisoners housing areas once every two weeks and that inmates may select books from such cart or request books from the jail reading library. In further answer to the allegations contained in said paragraph 26, these answering defendants deny each and every other allegation contained therein and which is not herein specifically admitted.

21. In answer to the allegations contained in paragraph 27 of the above-entitled complaint these defendants admit that inmates are transported to court where they are kept in holding tanks of the court and that they are returned to the jail at the middle or end of the court day. In further answer to paragraph 27 these defendants deny each and every other allegation contained therein. In further response to paragraph 27 these defendants allege that plaintiffs are barred and estopped from raising issues relevant to their right to a fair trial because these issues must be raised in plaintiffs' individual criminal trials.

22. These answering defendants deny each and every allegation contained in paragraphs 28, 29, and 30 of the

complaint in the above-entitled action.

23. In answer to the allegations contained in paragraph 31 of the complaint in the above-entitled action, these answering defendants admit that prisoners are provided with spoons to eat their meals. In further answer to the allegations contained in said paragraph, these answering defendants deny each and every other allegation not herein specifically admitted.

24. In answer to the allegations contained in paragraph 32 of the complaint in the above-entitled action, these answering defendants admit that lighting in all housing areas is controlled from the outside by jail officers and that cells are not furnished with chairs, stools, tables or desk areas and that all housing areas are windowless, and that prisoner housing at the jail consists of cells designed for 1, 2, 4 and 6 men. In further answer to the allegations of said paragraph, these answering defendants deny each and every other allegations not herein specifically admitted.

25. In answer to the allegations contained in paragraph 33 of the complaint in the above-entitled action, these answering defendants admit that, on occasion, inmates may be required to sleep on the floor and on those occasions, mattress, blankets and other sleeping materials are provided and that everything is done to find an inmate a bed as rapidly as is possible. These answering defendants further admit that toilets are located inside the cell areas. In further answer to the allegations contained in said paragraph, these answering defendants deny each and every allegation not herein specifically admitted.

26. In answer to the allegations contained in paragraph 34 of the Second Amended Complaint in the above-entitled action, these answering defendants admit that deputies, upon finding any prescribed medication on an inmate or in the

personal property of an inmate, seize the medication and notify the medical staff immediately. In further answer to the allegations contained in said paragraph, these answering defendants deny each and every other allegation contained in said paragraph which is not herein specifically admitted.

27. These answering defendants deny each and every allegation contained in paragraphs 35, 36, 37, 38, 39, 40, 41, 42 and 43 of the complaint in the above-entitled action.

28. In answer to the allegations contained in paragraphs 44, 46, 49, 52, 58, 60, 62, 64 of the complaint in the above-entitled action, these answering defendants incorporate their answers to paragraphs 1 through 43 of said complaint.

29. These answering defendants deny the allegations contained in paragraph 45 of the complaint in the above-entitled action. In further answer to the allegations contained in said paragraph, these answering defendants affirmatively allege that the presumption of innocence is statutory in California and, by statute, is solely an evidentiary presumption to be used at the criminal trial and for no other purpose. These answering defendants further allege that there are numerous alternatives available to prisoners in lieu of bail, including release on recognizance, and motions for reduction in the amount of bail, and cite-out procedures which are frequently used by arresting officers.

30. These answering defendants deny each and every allegation contained in paragraph 47 of the complaint in the above-entitled action. In further answer to allegations contained in said paragraph, these answering defendants affirmatively allege, on information and belief, that there are some inmates within the jail system who are financially able to post bail but who for various reasons cannot or choose not to post bail. These answering defendants further allege that there are numerous alternatives available to pre-trial

prisoners to obtain their release, including release on their own recognizance, motions for reduction in bail, and cite-out procedures. In further answer to allegations contained in said paragraph these defendants allege, on information and belief, that some of the named plaintiffs in this action have used these alternatives and have no standing to raise this issue. In further answer to said paragraph 47, these answering defendants affirmatively allege that there is another action pending between each alleged member of the class of pre-trial prisoners and defendants, to wit, their pending criminal trial, wherein the issue of the fairness of said prisoners' criminal trial is directly and necessarily at issue; that said prisoners have the best, most immediate means of raising such issues in said trial, that no purpose is served and no judicial economy saved by raising said issues herein. In further answer to the allegations of said paragraph 47, these answering defendants affirmatively allege that as to those former members of the class off pre-trial prisoners who have been convicted or found not guilty, and who did not, by appeal, challenge the issue off the fairness of their criminal trial, they are barred from proceeding in this action by the doctrines of res judicata and collateral estoppel.

31. These answering defendants deny each and every allegation contained in paragraph 48 of the complaint in the above-entitled action.

32. These answering defendants deny each and every allegation contained in paragraph 50 of the complaint in the above-entitled action. In further answer to the allegations contained in said paragraph, these answering defendants affirmatively allege, on information and belief, that there are some inmates within the jail system who are financially able to post bail but who, for numerous reasons, cannot or choose not to post bail. These answering defendants further

allege that there are various alternatives available to pre-trial prisoners to obtain their release, including release on their own recognizance, motions for reduction in bail, and cite-out procedures. In further answer to the allegations contained in said paragraph these defendants allege, on information and belief, that some of the named plaintiffs in this action have used these alternatives and have no standing to raise this issue. In further answer to said paragraph 50, these answering defendants affirmatively allege that there is another action pending between each alleged member of the class of pre-trial prisoners and defendants, to wit, their pending criminal trial, wherein the issue of the fairness of said prisoners' criminal trial is directly and necessarily at issue; that said prisoners have the best, most immediate means of raising such issues in said trial; that no purpose is served and no judicial economy saved by raising said issues herein. In further answer to the allegations of said paragraph 50, these answering defendants affirmatively allege that as to those former members of the class of pre-trial prisoners who have been convicted or found not guilty, and who did not, by appeal, challenge the issue of the fairness of their criminal trial, they are barred from proceeding in this action by the doctrines of res judicata and collateral estoppel.

33. These answering defendants deny each and every allegation contained in paragraph 51 of the Second Amended Complaint in the above-entitled action.

34. These answering defendants deny each and every allegation contained in paragraphs 53, 54 and 55 of the Second Amended Complaint in the above-entitled action.

35. These answering defendants deny each and every allegation contained in paragraphs 57, 59, 61 and 63 of the complaint in the above-entitled action.

36. These answering defendants deny the allegations contained in paragraph 65 of the complaint in the above-entitled action. In further answer to the allegations contained in said paragraph, these answering defendants affirmatively allege that Penal Code Section 851.5 is a penal provision of California law which may not be enforced by injunction or declaratory relief.

37. Defendants deny the allegations contained in paragraph 66 of the complaint in the above-entitled action, and in further answer to the allegations of said paragraph, affirmatively allege that prisoners confined in the jail are not arrested persons within the meaning of Section 4003 of the Penal Code.

38. These answering defendants deny each and every allegation contained in paragraph 67 of the complaint in the above-entitled action, and in further answer to the allegations contained in said paragraph, affirmatively allege that California Penal Code Section 4023 does not require a physician to be present on the premises of the facility 24 hours a day but merely requires a physician to be available to the jail at all times.

39. These answering defendants deny each and every allegation contained in paragraph 68 of the complaint in the above-entitled action, and in further answer to the allegations contained in said paragraph, affirmatively allege that plaintiffs do not have the standing nor authority to raise in this action the issues presented in said paragraph.

40. These answering defendants deny each and every allegation contained in paragraph 69 of the complaint in the above-entitled action.

41. In answer to the allegations contained in paragraph 70 of the complaint in the above-entitled action, these answering defendants admit that they have not acted illegally

or unconstitutionally toward any of the plaintiffs in this action and that they have not caused injury to any of the plaintiffs in this action. In further answer to the allegations of paragraph 70, these defendants allege that plaintiffs lack standing to assert many of the claims raised in this complaint against all of the defendants and that therefore no case or controversy exists as to these claims. In further answer to the allegations of said paragraph, these answering defendants deny each and every other allegation contained herein.

42. In answer to the allegations contained in paragraph 71 of the complaint in the above-entitled action, these answering defendants deny each and every allegation contained in said paragraph. In further answer to the allegations contained in said paragraph, these answering defendants affirmatively allege that the plaintiffs, and each of them, have a plain, speedy, and adequate remedy at law to raise each and every one of the complaints raised herein by means of a writ of habeas corpus or action for damages. In further answer to the allegations contained in said paragraph, these answering defendants affirmatively allege that each and every member of the class of pre-trial prisoners has a plain speedy, and adequate remedy for each and every one of the allegations contained in this amended complaint in that they may raise such issues quickly and easily in their pending criminal trial and that the judge therein has the power and authority to quickly remedy their grievances. These answering defendants, in further answer to the allegations contained in said paragraph, affirmatively allege, on information and belief, that many of the plaintiffs and members of the classes and subclasses have pending actions against the defendants wherein they are raising similar issues and plead such actions as a bar to their maintenance of the present action.

AS A SECOND FURTHER AND AFFIRMATIVE DEFENSE, THESE ANSWERING DEFENDANTS AFFIRMATIVELY ALLEGE:

1. On information and belief, that the plaintiffs and numerous members of the class of persons they seek to represent either now have pending or have had pending in the past other actions against the defendants on the same similar issues and that said actions are a bar to the maintenance of the present action.

2. On information and belief, that plaintiffs and numerous members of the class of persons they seek to represent have in the past maintained actions against the defendants on issues they seek to litigate herein and that said persons are barred by the doctrines of collateral estoppel and res judicata from litigating those issues herein.

AS A THIRD FURTHER AND AFFIRMATIVE DEFENSE, THESE ANSWERING DEFENDANTS AFFIRMATIVELY ALLEGE:

1. That insofar as the plaintiffs herein seek to require the County of Los Angeles to expend money or to seek equitable relief that in fact or as a practical matter is directed against the County of Los Angeles, this action is barred by the Eleventh Amendment and is not maintainable, pursuant to 42 U.S.C. 1983, in that the County of Los Angeles is not a person within the meaning of that statute.

AS A FOURTH FURTHER AND AFFIRMATIVE DEFENSE, THESE ANSWERING DEFENDANTS AFFIRMATIVELY ALLEGE:

1. That insofar as plaintiffs herein seek relief which requires the expenditure of money by the County of Los Angeles, that this action is an action for damages which entitles the plaintiffs herein to a trial by jury. Defendants and each of them hereby demand a trial by jury.

AS A FIFTH FURTHER AND AFFIRMATIVE DEFENSE, THESE ANSWERING DEFENDANTS AFFIRMATIVELY ALLEGE:

1. That presently there is a controversy between the County of Los Angeles and the State of California as to whether or not the Minimum Jail Standards of the State of California, as promulgated by the State Department of Corrections, pursuant to the authority given it by virtue of California Penal Code Section 6030, are mandatory or merely permissive and that if such Minimum Jail Standards are mandatory, the County of Los Angeles may, unless the State of California is made a party to this action, be subjected to a substantial risk of incurring inconsistent obligations by reason thereof.

2. The State of California is subject to the service of process, and the joinder of the State of California will not deprive the County of jurisdiction over the subject matter of the action, and in the absence of the State of California, the defendants herein who are already parties will be subject to a substantial risk of inconsistent obligations by reason of the claimed interest of the State of California.

AS A SIXTH FURTHER AND AFFIRMATIVE DEFENSE, THESE ANSWERING DEFENDANTS AFFIRMATIVELY ALLEGE:

1. That defendants are not subject to equitable relief for the acts or omissions of their subordinates unless defendants directed such acts or omissions.

WHEREFORE, defendants pray:

1. That the Court deny certification of this action as a class action both as to the purported class of plaintiffs and classes of defendants.

2. That the Court deny declaratory relief as prayed for by plaintiffs.

3. That the Court deny the preliminary and permanent injunctions prayed for by the plaintiffs.

4. That the plaintiffs take nothing by reason of this action.

5. That the Court not retain jurisdiction over defendants or this action.

6. That the Court deny plaintiffs' attorneys fees and costs of suit herein.

7. That the Court award defendants the cost of defense herein, and

8. That the Court award such other and further relief as may be proper.

DATED: June 29, 1976

Respectfully submitted,

JOHN H. LARSON, County Counsel

By /s/ David B. Kelsey

DAVID B. KELSEY

Deputy County Counsel

Attorneys for Defendants

(Declaration of Service omitted in printing).

Pretrial Conference Order.

United States District Court, Central District of California.

Dennis Rutherford, Harold Taylor, and Richard Orr, et al., Plaintiffs, vs. Peter J. Pitchess, et al., Defendants. No. CV 75-4111-WPG.

Filed: June 27, 1977.

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court,

IT IS ORDERED:

I. Nature of Action and Parties.

1. This is a class action seeking injunctive and declaratory relief against the practices and conditions of confinement at the Los Angeles County Central Jail (hereinafter "Jail"), located at 441 Bauchet Street, Los Angeles, California.

2. The issues are raised in the Second Amended Complaint for Declaratory and Injunctive Relief and the Answer to Second Amended Complaint and are discussed in detail in the parties' respective Memoranda of Contentions of Fact and Law.

3. The plaintiff class is defined as all prisoners in the Jail since December 31, 1975 and contains two subclasses, the first defined as all pretrial detainees in the Jail since December 31, 1975, and the second defined as all sentenced prisoners in the Jail since December 31, 1975. Unless otherwise indicated, hereinafter prisoners shall mean members of the plaintiff class; pretrial or unsentenced prisoners shall mean members of the pretrial detainee subclass, and sentenced prisoners shall mean members of the sentenced prisoner subclass. The pretrial detainee subclass is represented by plaintiffs DENNIS RUTHERFORD, HAROLD TAY-

LOR and GREGORY ARMSTRONG; and the sentenced prisoner subclass is represented by plaintiffs RUTHERFORD, ARMSTRONG, RICHARD ORR and JACK JONES.

4. The defendants, all sued in their official capacities, are PETER J. PITCHESS, as Sheriff of the County of Los Angeles, WILLIAM ANTHONY as Assistant Sheriff of the County of Los Angeles, WALTER HOWELL, as Chief of the Los Angeles County Sheriff's Department, Custody Division, PAUL MYRON as Captain of the Central Jail, JACK HOLT, JACK B. ROBBINS and ERNEST ZANSTER as Los Angeles County Sheriff's Department lieutenants assigned to the Jail, JAMES D. AUSTIN, LeROY K. JOHNSON, GERALD BOSWELL, RICHARD HENDERSHOT, JAMES CINDERELLI, DANNY CALHOUN, STEVEN CRAWFORD, JOHN FEHRN, STEVEN GAYHART, ANTONIO SAMANIEGO, FREDERICK SYKES, JOHN WARGO and FREDERICK WEISE, as Los Angeles County Sheriff's Department Officers assigned to the Jail and as representative of a defendant class defined as all Los Angeles County Sheriff's Department officers below the rank of lieutenant assigned to the Jail, and EDWARD EDELMAN, KENNETH HAHN, JAMES HAYES, PETER SCHABARUM and BAXTER WARD, as members of the Los Angeles County Board of Supervisors.

II. Jurisdiction and Venue.

Federal jurisdiction and venue are invoked upon the ground of claims arising under 42 U.S.C. §1983 to redress deprivations of civil rights occurring within the Central District of California and the ground of pendent jurisdiction to adjudicate related claims arising under California law.

III. Jurisdictional Facts.

A. Admitted Facts.

1. All defendants to the extent they have acted herein have done so under color of State Law.
2. Plaintiffs are citizens and persons within the meaning of 28 U.S.C. §1343(3).

B. No Other Contentions of Fact.

IV. Plaintiffs.

A. Admitted Facts.

1. Plaintiffs DENNIS RUTHERFORD, HAROLD TAYLOR and GREGORY ARMSTRONG were charged with criminal offenses under California law and during the pendency of this action were incarcerated as unsentenced prisoners in the Jail awaiting trial in California courts in Los Angeles County.

2. Plaintiff RUTHERFORD was a pretrial prisoner in the Jail from November 5, 1972 to January 23, 1976, held in lieu of bail, which ranged between \$30,000 and \$10,000. He was a convicted prisoner in the Jail from June 3, 1976 to July, 1976.

3. Plaintiff TAYLOR was a pretrial prisoner in the Jail from December 17, 1973 until August, 1976, held in lieu of \$350,000 bail.

4. Plaintiff ARMSTRONG was a pretrial prisoner in the Jail from October 4, 1975 to December 23, 1976, held in lieu of \$50,000 bail.

5. Plaintiffs JACK JONES, RICHARD ORR, ARMSTRONG and RUTHERFORD were sentenced prisoners in the Jail during the pendency of this action.

6. On March 23, 1976, the Court certified this action as a class action within the meaning of Federal Rules of Civil Procedure, Rule 23(b)(2), on behalf of a class con-

sisting of prisoners in the Jail since December 31, 1975, and two subclasses, the first consisting of all pretrial detainees in the Jail since December 31, 1975, and the second consisting of all sentenced prisoners in the Jail since December 31, 1975.

7. Unsentenced prisoners are incarcerated because they did not post bail or otherwise secure their release pending trial, and they are entitled to a presumption of innocence in their criminal cases as provided by law. After their arraignment they are confined in the Jail by judicial order solely to insure their presence at trial.

B. Plaintiffs' Contentions of Fact.

1. Whether most unsentenced prisoners are indigent and are held in lieu of bail which they cannot afford to post.

C. Defendants' Contentions of Fact.

1. Whether the claims or defenses of the representative plaintiffs are not typical of the claims or defenses of the class in that the circumstances and treatment of plaintiffs are not typical of the circumstances and treatment of inmates generally.

2. Whether the representative parties cannot fairly and adequately protect the interests of the class and subclasses in that they have not raised all claims reasonably expected to be raised by the members of the class, including claims for damages; and in that the claims and positions reasonably expected to be raised by one subclass, sentenced prisoners, are in conflict with and incompatible with the claims of another subclass, unsentenced prisoners, and that to fully and completely press the claims of sentenced prisoners necessarily requires less than fair advocacy of the claims of unsentenced prisoners; and the conditions under which present prisoners are confined are vastly different from the con-

ditions under which the representative plaintiffs were confined.

3. Whether all unsentenced prisoners are indigent.

V. Defendants.

A. Admitted Facts.

1. Defendant PETER J. PITCHES is, and at all times herein relevant has been, the duly elected Sheriff of the County of Los Angeles, California and keeper of the Jail pursuant to Government Code §26605 and Penal Code §§4000, 4005 and 4006, and as such is charged with the statutory duty of maintaining and operating county jail facilities including the Jail. He is the head of one of the largest police agencies in the world and is the chief law enforcement officer in the County of Los Angeles responsible for providing law enforcement to a population in excess of seven million people living in an area in excess of 4,000 square miles and consisting of over 5,000 sworn personnel, as well as being responsible for numerous other difficult and intractable responsibilities, including the service and enforcement of hundreds of thousands of civil processes, serving as bailiff for one of the largest court systems in the world. One of his responsibilities is the operation of one of the largest detention systems in the world which consists of seven major facilities and numerous minor facilities, and which houses over 200,000 prisoners a year and has an average daily population of over 9,000 inmates, a substantial portion of whom are within the system less than ten days. In the performance of these duties, the Sheriff reasonably and necessarily delegates responsibilities for operation of the detention facilities to others and has little direct involvement in its daily operation, policies and procedures. In the furtherance of the delegation of these responsibilities, responsibilities are delegated to an undersheriff, two assistant

sheriffs, eight divisions headed by division chiefs, numerous inspectors and hundreds of other supervisory personnel.

2. Assistant Sheriff WILLIAM J. ANTHONY is charged with the overall supervision of the Sheriff's Custody Division and other divisions and is third in command of the Sheriff's Department under the direct supervision of Undersheriff Sherman Block, who is not a defendant in this action. In the performance of his duties, Assistant Sheriff ANTHONY necessarily and reasonably delegates responsibilities for operation of the jails to a division chief, four inspectors, who are not defendants in the action, and numerous other subordinates not all of whom are defendants in this action. He has been delegated supervisory responsibilities for maintaining and operating county jail facilities, including the Jail.

3. WALTER HOWELL is the Chief of the Custody Division of the Sheriff's Department and as such is responsible for supervision of all detention facilities within the Sheriff's Department, including seven major facilities, numerous smaller facilities, and the detention facilities at each of the Sheriff's substations. In the performance of his duties, Chief HOWELL necessarily and reasonably delegates responsibilities to four inspectors, who are not defendants herein, and numerous other subordinates, not all of whom are defendants herein. He has been delegated supervisory responsibility for maintaining and operating county jail facilities, including the Jail, and for promulgating rules for the care and treatment of prisoners in the jail.

4. Defendant PAUL MYRON is Captain of Central Jail and has been since approximately February of 1977. He replaces Captain Farrell, Captain White and Captain Wheatley, who were former defendants in this action. Pursuant to the Federal Rules of Civil Procedure, Rule 25(d), Captain Myron has been automatically substituted as defendant

herein. In the performance of his duties, Captain MYRON reasonably and necessarily delegates his responsibilities for the operation of the jail to numerous subordinates, not all of whom are defendants herein. He has been delegated direct supervisory responsibility for the administration of the Jail.

5. JACK HOLT, JACK E. ROBBINS and ERNEST ZANSLER are lieutenants of the Los Angeles County Sheriff's Department and as such have been delegated supervisory responsibility with regard to managing and administering the Jail.

6. Deputy Sheriffs and defendants JAMES D. AUSTIN, LEROY K. JOHNSON, GERALD BOSWELL, RICHARD HENDERSHOT, JAMES CINDERELLI, DANNY CALHOUN, STEVEN CRAWFORD, JOHN WARGO are currently Los Angeles County Sheriff's Department Officers assigned to Central Jail. As such, they carry out directives and policies of the Jail and have been assigned specific duties with regard to the everyday operations of the Jail and the control of certain prisoners.

7. Defendant JOHN FEHRN was and defendants and Deputy Sheriffs STEVEN GAYHART, ANTONIO SAMANIEGO, FREDERICK SYKES and FREDERICK WEISE are Los Angeles County Deputy Sheriffs. All said defendants were at the time of service of the Second Amended Complaint, but no longer are, assigned to the Jail, and as such carried out the directives and policies of the Jail and were assigned specific duties with regard to the everyday operations of the Jail and the control of certain prisoners. Defendants FEHRN, SAMANIEGO, SYKES and WEISE were no longer assigned to the Jail after the following dates in 1976, respectively: December 25, October 23, December 18 and December 18.

8. Defendants EDWARD EDELMAN, KENNETH HAHN, JAMES HAYES, PETER SCHABARUM and

BAXTER WARD are and at all times relevant herein have been the duly elected and acting members of the Board of Supervisors of the County of Los Angeles.

9. Defendants are all sued in their official capacities.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants AUSTIN, JOHNSON, BOSWELL, HENDERSHOT, CINDERELLI, CALHOUN, CRAWFORD, FEHRN, GAYHART, SAMANIEGO, SYKES, WARGO and WEISE are representative of a class within the meaning of Federal Rules of Civil Procedure, Rule 23(b)(1) consisting of all Los Angeles County Sheriff's Department officers below the rank of lieutenant, assigned to the Jail.

2. Whether the acts and omissions herein described were committed and conditions herein described were maintained by defendants personally and through actions of their agents, and subordinates, acting pursuant to defendants' instructions, directions, encouragement, and/or known acquiescence.

C. Defendants' Contentions of Fact.

1. Whether defendants EDELMAN, HAHN, HAYES, SCHABARUM and WARD have only limited supervisory responsibilities over the Sheriff of the County of Los Angeles which is shared with the State Attorney General of the State of California and cannot direct the performance of the Sheriff's duties.

2. Whether at no time have defendants done any acts or omissions directly or personally which are illegal or enjoined in this action.

3. Whether all rules and policies promulgated by defendant HOWELL and/or MYRON that involve the plaintiff class are valid, legal and constitutional.

4. Whether there is no present existing basis for injunctive relief as to defendants FEHRN, GAYHART, SAMANIEGO, SYKES and WEISE.

IV. Jail Population.

A. Admitted Facts.

1. The Jail's stated capacity established by the California Board of Corrections is 5548, consisting of 5098 non-medical beds and 450 hospital beds.

2. The proportion of unsentenced prisoners, sentenced prisoners facing no additional criminal charges and prisoners sentenced under one or more convictions and awaiting trial on one or more additional criminal charges varies from time to time, but at the present are approximately 65% unsentenced, 22% sentenced facing no additional charges and 13% sentenced facing additional charges.

B. No Other Contentions of Fact.

V. Mail.

A. Admitted Facts.

1. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to legal and non-legal mail is as set forth in pre-marked Exhibits Z (pp. 47-48), A (pp. 58-59), D (pp. 1-2), E (pp. 1-2) and BO.

B. Plaintiffs' Contentions of Fact.

1. Whether notwithstanding the stated written policy out of the presence of prisoners, defendants open and sometimes read prisoners' legal mail to and from attorneys, courts and public officials.

2. Whether notwithstanding the stated written policy out of the presence of prisoners, defendants open and sometimes read and censor prisoners' incoming and outgoing mail, and do not provide the affected prisoner or sender with notice of or opportunity to contest that censorship.

C. Defendants' Contentions.

1. Whether there are serious, compelling and legitimate institutional concerns preventing the introduction of contraband into the jail through the use of mail, and procedures designed to accomplish this in an expeditious manner compatible with prompt delivery of mail and minimalization of these concerns is appropriate and proper.

VI. Telephone Calls.

A. Admitted Facts.

1. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to telephone calls by prisoners is as set forth in pre-marked Exhibits BN, Z (p. 15), A (p. 60), F and G.

2. Six telephones are located on each floor of the original Central Jail facility adjacent to the inmate modules, in the hospital, and six telephones are located within each of the regular housing modules in the new addition to the jail and two telephones are located within each of the disciplinary/segregation modules in the new addition to Central Jail. Telephones are also located within the pro per law library and within the non pro per law library.

3. Defendants do not permit prisoners to receive incoming telephone calls except in emergencies or other unusual circumstances.

B. Plaintiffs' Contentions of Fact.

1. Whether notwithstanding the stated written policy defendants deny prisoners reasonable access to telephones to make outgoing calls, after the booking process is completed only allow prisoners to make phone calls from within the Jail through Court orders or infrequently granted permission from Jail officers, and limit the length of telephone calls to five minutes.

C. Defendants' Contentions.

1. Whether as defendants contend: Central Jail policy permits prisoners reasonable access to telephones to make outgoing calls; all inmates are entitled to at least two or more free telephone calls within the local dialing area when booked and before certain proceedings; additional calls are permitted at booking when appropriate; and the opportunity for telephone calls for emergency purposes may be requested at any time from the module officer, the senior deputy on the floor, or from the chaplain.

2. Whether as defendants contend: Inmates are permitted to use the telephones on a rotation basis throughout the day and night; and it is the Central Jail policy that the prisoners are given access to these phones as much as possible without interfering with normal procedures and that each inmate receive a fair opportunity to make telephone calls.

3. Whether as defendants contend: Incoming telephone calls are not routinely permitted but are permitted only in emergencies or unusual circumstances; and permitting incoming telephone calls is not feasible in light of the number of inmates detained, the arrangement of the jail and the administrative and logistical problems of timely locating inmates.

VII. Visitation.

A. Admitted Facts.

1. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to prisoner visitation is as set forth in pre-marked Exhibits A (pp. 60-61), and B (pp. 29-30).

2. Inmates are permitted daily visits with adults and children between the hours of 8:30 a.m. and 8:30 p.m. The number of visits at Central Jail currently averages over 2,000

a day and over 63,000 a month.

3. Pretrial prisoners are allowed one daily 20 minute visit, and sentenced prisoners are allowed one daily 60 minute visit.

4. Physical contact between prisoners and visitors is not routinely permitted.

5. Some sentenced prisoners confined at some of defendants' detention camps, some Federal and California prisons, and some jail facilities in other counties are permitted to have some physical contact with their visitors.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants deny prisoners reasonable opportunity to visit with family and friends.

2. Whether most sentenced prisoners at Federal and California prisons and at jail facilities in Los Angeles County are permitted to have physical contact with their visitors, including embracing, kissing, holding hands and holding children.

C. Defendants' Contentions of Fact.

1. Whether as defendants contend: To accommodate visitation, there is a large, modern, air-conditioned visiting area designed to accommodate approximately 228 visitors at a time; this visiting area is generally in constant use throughout the day; visiting areas are arranged in corridors designed to minimize noise between rows, and small privacy partitions are located between each visiting location to likewise reduce noise and provide some element of privacy; visitors and the inmates they are visiting may view each other through large, clear glass panels and may speak over modern, well-maintained telephones; an area to sit and a shelf is provided on both the inmate and visitor side for convenience and comfort. No direct supervision of each

visitor or inmate during the visiting period is routinely done or required; a timing device connected to each visiting area insures that each inmate receives his full allotment of time for visiting; and inmates and visitors are not generally subjected to searches before or after visits.

2. Whether as defendants contend: Contact visits are not and cannot be permitted at Central Jail without causing unacceptable risks of harm to inmates, visitors and personnel, and unacceptable breaches of the facility's security; there are no rooms or facilities within Central Jail that are feasible for conversion to contact-type visits even if the security risks were not present; and if a location for such visits could be located and if the security risks were not present, the number and frequency of visits permitted inmates would have to be considerably diminished and embarrassing or other searches of visitors and inmates would be required on at least a frequent or random basis.

VIII. Reading Matter.

A. Admitted Facts.

1. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to prisoners' access to and receipt of reading matter is as set forth in pre-marked Exhibits BX, A (p. 89), H, I, J and K.

2. There is an extension of the Los Angeles County Library located at the original Jail facility containing about 5000 volumes.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants drastically limit prisoners' access to reading matter, including newspapers, magazines and books by failing to provide prisoners with an adequate selection of reading matter, by permitting prisoners only infrequent, indirect access to available reading matter, by

prohibiting prisoners from receiving reading matter from visitors, and by prohibiting prisoners, from receiving reading matter through the mail.

C. Defendants' Contentions of Fact.

1. Whether as defendants contend: Inmates at Central Jail have reasonable access to reading materials; paperback books, magazines and newspapers are sold in the modules from the jail commissary cart; the books so sold include best sellers and other books selected on the basis of popularity; at any one time, there are, in addition, about 50 library and other books within each module that may be exchanged between prisoners; and visitors may deliver books and magazines to inmates after visits.

2. Whether as defendants contend: The extension of the Los Angeles County Law Library located within the Jail is not large enough to permit all inmates direct access to it; and the system was designed to give inmates access to the library by means of a library cart which is taken to each row on the old side of the Jail about every ten days.

3. Whether as defendants contend: Although not yet fully operational, a new 12,000 volume extension of the County library system will be opened on the fourth floor of the new addition to the Jail; the structure of the new addition to the Central Jail and the way it was designed and the space available in the new library facilities will not feasibly permit inmates to visit the library directly; the books will be distributed from that library by means of a cart as is now the practice on the old side of the Jail; when this library is fully operational, the cart from each of the jail library facilities will visit each module approximately once a week; and in the meantime, the Jail librarian distributes free paperbacks, which need not be returned, to the inmates in the new addition to the Jail.

IX. Recreation.

A. Admitted Facts.

1. Unsentenced prisoners who are not trustees do not presently have the opportunity for outdoor exercise and recreation.

2. Only working trustees presently receive an opportunity for outdoor recreation.

3. The Jail has been designed to permit at least two hours a day of freeway or dayroom time, one hour each on the day and evening shifts.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants deny prisoners adequate opportunity to exercise and recreate outdoors.

2. Whether defendants deny pretrial prisoners reasonable opportunity to divert themselves indoors in that pretrial prisoners are locked in their cells or infirmary wards or rooms at all times except when specified business, such as court appearances, medical care, meals, attorney interviews, personal visits, shower, chaplain consultations, and educational classes otherwise require, such prisoners are only infrequently allowed to use dayrooms adjacent to their cell-blocks or infirmary wards or rooms, and said dayrooms are barren of recreational equipment, including televisions, radios, games and reading matter.

C. Defendants' Contentions of Fact.

1. Whether as defendants contend: Between approximately 15-30% of the pretrial inmates are transported to court each weekday, a process which usually takes 5-10 hours; about 40-50% of the entire Jail population, both sentenced and unsentenced, have a visit each day; a process which takes about an hour or more; and presently, 200 or so of the pretrial inmates are trustees who are involved in

work assignments during the day and presently have access to dayrooms and television.

2. Whether as defendants contend: Throughout the day, most inmates whose classifications permit them to mix with other inmates can go by request to such activities as school, Bible study, visits to the chaplain, and other activities; such inmates could, if they desire, spend up to several hours a day at school; and as indicated earlier, there are about 43 pay telephones available to pretrial inmates for use throughout the day.

3. Whether as defendants contend: Because of the move into the new addition and the new personnel involved, and the difficulties of working out problems concerning the new policies and the need to recruit and train additional personnel, this practice has not yet been uniformly accomplished in every module; and even at present, however, inmates in each module receive about one hour a day of freeway time.

4. Whether as defendants contend: Only working trustees at present receive an opportunity for outdoor recreation; although the new jail addition includes a large outdoor recreation area, defects in its construction and the need to fix responsibility for such with the contractor; as well as administrative and logistical problems associated with the opening of the new addition to Central Jail and the need to recruit and train additional personnel have precluded present use of such facilities; when such problems are solved, it should be possible to permit those inmates the opportunity for at least one hour a week of outdoor exercise in addition to freeway time and other recreational activities.

5. Whether increased opportunities for freeway time and outdoor recreation create increased risks of thefts of personal property, tensions, and assaults which cannot be significantly reduced even with substantial increases in

supervising personnel.

6. Whether as defendants contend: The Jail is presently implementing a new classification system which is the result of several years of study and planning; present indications are that when fully implemented, such classification system may permit the classification of significant numbers of pre-trial inmates as minimum security, low moderate security, moderate security, high moderate security, and only a small number as maximum security; present data suggests that when implemented, such a classification system may ideally permit those pretrial inmates classified as minimum security to qualify for dormitory housing and permit travel about the jail on an unescorted basis; those classified as low moderate to have relative free movement in cellblocks and open day-rooms, if possible; those classified as moderate to have constant access to the freeway, and possible access to the adjoining dayroom in the new modules and permit travel about the jail without escorts; those inmates classified as high moderate to have constant use of the freeway area; and those classified maximum have access to the freeway area on a limited basis and to require escorts; until the system is fully implemented and tested, no firm commitments can be made; and defendants hope to have sufficient data within six months.

7. Whether as defendants contend: All inmates, pretrial and sentenced, if they wish, may participate in educational classes at Central Jail; classes are presently offered for over 170 hours a week and will be expanded in fiscal year 1977-78; classes are offered in General Educational Development Equivalency Certificates, health/science education, English and Spanish as a second language and vocational classes for sentenced inmates; the courses are provided by the La Puente Independent School District by qualified instructors; in 1974 over 17,400 inmates participated in these classes

and the number has increased this year and will increase further next year; in 1974 over 145,000 student hours of education were provided at Central Jail and the number is increasing; between 7 and 12% of the entire pretrial population participates in the educational program at any one time; and counseling services are also provided.

X. Housing

A. Stipulated Facts.

1. The cell designations, the number of men per cell, the number of cells, the size of each cell in square feet, the size of the adjoining freeway in square feet, the size of the dayroom to which the cell area is assigned, and the square footage per prisoner at rated capacity for all of the Jail's non medical housing area are as set forth in Schedule A, attached hereto and incorporated herein by reference.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants confine pretrial prisoners under conditions lacking in privacy or sensitivity to basic human needs; and as a rule, pretrial prisoners are housed in overcrowded cells in which excess prisoners must sleep on the floor, sometimes without a mattress, whereas single cells, which afford a modicum of privacy, are used only for sentenced trustees, for discipline and administrative segregation or for prisoners exhibiting agitated behavior, and dormitories, which afford greater freedom of movement and living space, are used only for sentenced trustees.

2. Whether all one, two, four, six, eight and ten man cells contain one toilet, one wash basin and one fountain and a number of beds equivalent to their rated capacities.

3. Whether housing in the Jail's infirmary consists of the following:

(a) One 48-bed ward, 54 feet wide and 56.6 long;

- (b) Six 10-bed wards, each 38 feet long and 19.5 feet wide;
- (c) Two 8-bed wards, each 34 feet long and 19 feet wide;
- (d) Four 5-bed wards, each 32.3 feet long and 11.6 feet wide; and
- (e) 122 one-bed rooms, each 12.4 feet long and 7.10 feet wide.

C. Defendants' Contentions of Fact.

1. Whether most cells are equipped with toilet facilities, wash basins, fountains, desks, seats and beds, sufficient for the number of inmates for which it was designed and rated.

2. Whether as defendants contend: The recommended and actual practice of most jails is to install sanitary facilities consisting of a toilet and wash basin in each cell; and the installation of such sanitary facilities in each cell results in significant custodial and medical benefits, has been approved by the State Board of Corrections, never found to present a health or sanitation problem by the Health Department, and does not present a significant medical liability.

XI. Views to the Outside.

A. Admitted Facts.

1. There are no windows and open areas through which prisoners may view the outside, and former windows on the old side of the Jail have been sealed.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants deny prisoners a reasonable view to the outside world and have covered over previously existing windows in the Jail without adequately exploring alternatives which accommodate both Jail security and prisoner needs.

C. Defendants' Contentions of Fact.

1. Whether reopening the former windows at Central Jail or attempting to create windows in the new addition to the Jail presents unacceptable security risks, is incompatible with the environmental control system in use at the Central Jail and fire code provisions, and presents a health hazard and is too costly in light of the limited benefits to the inmates.

2. Whether, as defendants contend: The original Central Jail facility, first occupied in 1963, was designed and built with clear windows in most cell blocks, all dayrooms and hospital rooms; the Fire Department required that these windows be wired glass and would not permit the use of other types of nonbreakable window materials because, when heated, they tend to break and create drafts that cause an increased fire hazard within a building such as Central Jail; the windows contained six inch by nine inch panes housed in special security window frames designed to prevent escapes, were of the type recommended as standard window frames for maximum security institutions to provide reasonable security against escape, and were located eight feet from the nearest prisoner housing area; during the first six months of operation of the Jail, at least one-third of these windows were broken by inmates; the broken windows interfered with the security of the facility, hampered the controlled air circulation and were unsightly; various other non-breakable transparent materials were considered but were not approved by the Fire Department, which contended they created unreasonable fire hazards; allegedly tamper-proof stainless steel security screens of the type generally used in mental institutions were then installed; within a month after their installation, many of the screens were destroyed and ripped by inmates and proved wholly unsatisfactory; inmates were able to obtain hacksaw blades, weapons, narcotics, and other contraband through the broken security screens

with the assistance of confederates outside the jail; and several escapes and escape attempts occurred.

3. Whether as defendants contend: Next, fourteen-gauge steel plates were fixed to the inside of the windows using tamper-proof screws initially and later welding them in place; on numerous occasions, inmates were able to rip down and remove these steel plates; several escapes and escape attempts occurred; and bars were installed over the outside of the windows; nevertheless, inmates were able to saw through these bars and on several occasions, escape attempts continued.

4. Whether as defendants contend: When the determination to build the Jail was made, it was decided that the most helpful environment could be maintained by the use of an environmental control within the facility that would control the temperature of the air, its humidity, circulation, as well as provide cleaning and filtering; effective use of such a full environmental control system necessitated minimizing all effective leaks of air from the system; and because of the serious threat to the security of the facility presented by the window openings, and the inability to secure them and prevent air leaks, the contractor for the new addition to the jail installed precast concrete window enclosures over the existing window openings and the new jail was designed and built without windows.

5. Whether as defendants contend: There is no known method by which the existing building could be made secure if the windows were reopened; and moreover, the estimated costs of reopening these windows even if attempted is in excess of a million dollars and would still present security problems as well as create a health problem due to the inefficiency of the environmental control system in use in the jail.

XII. Searches.

A. Admitted Facts.

1. Defendants periodically search cellblocks, particularly those occupied by pretrial prisoners, sometimes in the absence of the prisoner-occupants.

2. Searches of inmate property are necessary to maintain the security of the facility, prevent escapes, maintain order, and minimize the potential for injury to inmates and staff.

3. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to searches of prisoners housing areas and property is as set forth in pre-marked Exhibits BR, BO, A (pp. 18, 31-32), CC and DD.

B. Plaintiffs' Contentions of Fact.

1. Whether notwithstanding the stated written policy defendants periodically and systematically ransack cells, particularly those occupied by pretrial prisoners, in the absence of the prisoner-occupants.

2. Whether notwithstanding the stated written policy whether during these ransackings, commonly known as "shakedowns", officers first remove all prisoners to an adjacent dayroom and then tear apart cells, throw prisoners' property all over the cells and confiscate prisoner property without providing prisoners any receipt or notice of or opportunity to contest confiscation.

C. Defendants' Contentions of Fact.

1. Whether cell searches are infrequently conducted at Central Jail.

2. Whether searches at Central Jail are conducted in accordance with procedures which are designed to minimize interference with prisoners and their property, prevent the loss or destruction of prisoner property, and maintain confidentiality of prisoners' legal materials.

XIII. Meals.

A. Admitted Facts.

1. The length of meals in the dining hall within Module 1700-1750 provided to prisoners representing themselves *in propria persona* is not at issue herein due to the judgment in *Brown v. Pitchess*, Los Angeles Superior Court, No. 24464.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants deny prisoners, particularly pre-trial detainees, sufficient time to eat their meals.

XIV. Opportunity to Sleep.

A. Admitted Facts.

1. Normal lights are on in prisoner housing areas from about 5:00 a.m. to about 10:00 p.m.; and lower wattage lights, varying in intensity from cell area to cell area, are kept on through the night.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants deny prisoners, particularly pre-trial prisoners, sufficient opportunity to sleep in that bright lights within the cells remain on from about 5:00 a.m. to late evening daily, prisoners must stand for daily counts, and the Jail's Officers make continuous noises with the intercom system.

C. Defendants' Contentions of Fact.

1. Whether dim, low-wattage night lights are necessary to maintain security and prevent assaults.

XV. Court Transportation.

A. Admitted Facts.

1. Each weekday the Sheriff transports between 700 and 1,000 inmates to 26 separate jurisdictional courts located over the wide expanse of the County of Los Angeles.

2. After breakfast and the opportunity to shave and do other personal items, prisoners going to court are given an opportunity to change into their own clothes for court. They are then processed for court, segregated into groups according to the court they are going to and are loaded on appropriate buses beginning at 7:00 a.m.; they are transported to the various court facilities arriving there between 8:00 a.m. and 8:30 a.m. as decided by the particular court.

3. Buses from courts generally begin returning in the early afternoon between 12:00 p.m. and 4:00 p.m., bringing back inmates who have already finished their court appearances. On a daily basis prisoners returning from court arrive at the Jail at 6:00 p.m. or later and are sometimes not returned to their housing areas until 8:00 p.m. or later.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants subject prisoners going to court to a harsh, exhausting routine which jeopardizes their right to a fair trial.

2. Whether on days they go to court, prisoners are awakened before 5:00 a.m. and then spend their days in a series of crowded holding tanks within the Jail and court-houses and on buses taking them to and from the courts without being provided with adequate meals.

3. Whether prisoners returning from court frequently do not reach their housing areas until 8:00 p.m. or later.

C. Defendants' Contentions of Fact.

1. Whether as defendants contend: None of the defendants have any control over the times that the judges of the various courts require the Sheriff to have prisoners at the various courts; most courts require the Sheriff to have inmates at the court between 8:00 a.m. and 8:30 a.m. and sometimes keep the inmates in court well after 6:00 p.m.;

and the Sheriff cannot retain custody of the inmates from the courts each day until the judges of the courts provide the Sheriff with valid commitment orders for the inmates.

2. Whether as defendants contend: Several of the courts conduct night courts and require the Sheriff to bring inmates for such night courts; such night courts are held on Mondays; and when an inmate goes to night court, he is not transferred to court until 11:30 a.m. and may not be done with court until 9:00 p.m. or 10:00 p.m.

3. Whether inmates going to court are awakened at the same time as other inmates in the Jail, approximately 5:00 a.m.

4. Whether as defendants contend: Additional transportation runs throughout the day are made between the courts and Central Jail as buses become available and as the need arises; the final pick up of prisoners at each court is made when the last prisoner at that court is finished and the commitment orders from that court are given to the Sheriff; although the times inmates are finished at each court varies from day to day depending on the number of inmates at the court and whether a particular judge has held a late court, the last inmate is done at most of the courts between 4:00 p.m. and 7:00 p.m.; except Mondays when some courts hold night court, most inmates on most days are returned to the Jail before 8:00 p.m.; on Mondays when some courts hold night court until as late as 9:00 p.m. or so at night, inmates who were not transported to such courts until 11:30 a.m. may not get back to the Jail until 9:30 to 10:30 p.m.; and on rare occasions because of unusual circumstances, such as an equipment breakdown or other infrequent occurrences, an inmate has not gotten back to the Jail until as late as 11:00 p.m.

XVI. Prisoners' Property.

A. Admitted Facts.

1. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to prisoners' possession of property is as set forth in pre-marked Exhibits Z (pp. 1, 2, 9, 10, 50-53), A (pp. 14, 71, 73-74), B (p. 31), AE, AO, AP, AQ, AR, AS, AT, AU and AV.

2. A commissary cart visits each cell area and offers for sale personal hygiene items, stationery, reading material, candy and numerous other items.

3. Items sold from the commissary cart are as set forth in pre-marked Exhibit CQ.

4. The Jail Chaplain is responsible for the dissemination to indigent prisoners of their personal hygiene items, stationery, stamps and other items.

5. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to providing indigent prisoners with certain free items is as set forth in pre-marked Exhibits A (p. 87) and B (p. 12).

B. Plaintiffs' Contentions of Fact.

1. Whether defendants unduly restrict the items that prisoners may possess within the Jail and routinely confiscate prisoners' personal belongings including but not limited to, correspondence and photographs.

2. Whether defendants deny prisoners an adequate opportunity to obtain from family and friends or to purchase at the Jail commissary necessities and amenities of life, such as soap, toothbrush, toothpaste, comb, deodorant, paper and pencils; and fail to provide indigent prisoners with such items.

3. Whether defendants unduly restrict plaintiffs' opportunities to obtain fresh street clothing for their court

appearances and as a consequence plaintiffs' clothing frequently becomes soiled, smelly and wrinkled during the course of a trial.

C. Defendants' Contentions of Fact.

1. Whether indigent inmates are provided personal hygiene items, stationery, stamps and other items within a few hours after submitting a written request therefor.

XVII. Hygiene and Sanitation.

A. Admitted Facts.

1. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to providing prisoners fresh Jail clothing is as set forth in pre-marked Exhibits A (pp. 64-65), B (p. 43), AA and BS.

2. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to sanitation is as set forth in pre-marked Exhibits CB, A (pp. 25-27, 48, 70) and BD.

3. Prisoners are required to clean and maintain their own housing areas; a standard institutional issue of clothing for inmates includes but is not limited to clean socks, clean undergarments, clean outer garments; an inmate's undergarments may be substituted for the institutional undergarments.

B. Plaintiffs' Contentions of Fact.

1. Whether the defendants deny prisoners, particularly pretrial prisoners, reasonable facilities and materials with which to launder their clothing, including undergarments.

2. Whether defendants frequently deny prisoners, particularly pretrial detainees, adequate opportunity to bathe.

3. Whether defendants deny prisoners, particularly pretrial prisoners, reasonable opportunities to obtain fresh jail clothing and linens.

4. Whether defendants fail to take adequate measures to preserve sanitation and prevent the spread of contagious diseases, thereby threatening the health of prisoners.

C. Defendants' Contentions of Fact.

1. Whether as defendants contend: All inmates have the opportunity for at least three showers a week; and hot and cold running water and soap are available in all housing areas.

2. Whether the Sheriff Department policy requires that each facility maintain a sufficient supply of clothing and bedding for normal and emergency requirements of the inmates.

3. Whether as defendants contend: Each inmate is provided one clean serviceable mattress, one clean sheet or mattress cover, one towel, one or more blankets depending upon climatic conditions; these items are freshly laundered and sanitized after each use and issued at the time of booking to each inmate; washable items such as sheets, mattress covers and towels are exchanged for clean replacements at least each week; and blankets are laundered or dry cleaned at least every three months or more often if necessary.

4. Whether prisoners' jail outer garments are exchanged at least once a week or more frequently if work, climatic conditions or illness require.

5. Whether inmates are provided with suitable footwear if the inmate's personal shoes are inappropriate for the facility or if no shoes were worn at the time of arrest.

6. Whether as defendants contend: All pretrial inmates are allowed one complete, non-institutional clothing exchange; exchanges consist of shoes, outer garments and a wrap (coat, sweater, etc.); and all additional clothing exchanges are handled by special request.

7. Whether each housing area is equipped with hot and cold running water and inmates are provided with laundry soap.

8. Whether as defendants contend: The facility is and has been found by the Health Department and the State Board of Corrections to be maintained in a clean and sanitary manner; floors are swept and mopped daily; bars are dusted daily and washed weekly; garbage and trash receptacles are emptied and sanitized at least once a day; and toilets, urinals, sinks and basins are cleaned daily.

9. Whether in conjunction with the medical staff, the facility has developed and implemented procedures for the treatment of vermin within the housing areas.

10. Whether staff are assigned to conduct weekly health and maintenance inspections of the facility.

11. Whether prisoners are provided materials to clean and maintain their own housing areas.

XVIII. Temperature.

A. Admitted Facts.

1. The Jail has a full environmental control system which is designed to regulate temperature, humidity and ventilation and to cleanse the air.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants fail to maintain the Jail's temperature control system in working order; and temperatures within the Jail are frequently too hot or too cold, thereby causing a threat to the health of prisoners.

XIX. Access to the Courts.

A. Admitted Facts.

1. All sentenced prisoners have access to a law library found adequate in accordance with the decision brought on behalf of all Los Angeles County Jail sentenced inmates in

the case of *Bailey v. Pitchess*, U.S.D.C. No. 72-1957-F.

2. Access to the courts for prisoners representing themselves *in propriis personis* is not an issue herein due to the judgment in *Brown v. Pitchess*, Los Angeles Superior Court No. C 24464.

3. All pretrial inmates who are not pro pers have either a court-appointed lawyer or a private attorney.

4. Public Defenders are empowered to and do occasionally upon the order of the court or upon request of the person involved represent persons who are not financially able to employ counsel in a proceeding of any nature relating to the nature or conditions of detention, of other restrictions prior to adjudications, of treatment, or of punishment resulting from criminal or juvenile proceedings. See California Government Code §27706.

5. Inmates are not precluded from seeking legal assistance from other inmates with whom they come into contact.

6. Prisoners other than pro pers do not have access to typewriters.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants deny pretrial prisoners access to the courts by failing to provide such prisoners with reasonable access to an adequate law library and other necessary materials, such as writ forms, typewriters, typing papers, legal pads, and pencils, by prohibiting prisoners from receiving law books and legal materials from outside sources and by denying prisoners reasonable opportunities to obtain assistance from other prisoners who are relatively sophisticated in matters of law, commonly known as "jailhouse lawyers."

C. Defendants' Contentions of Fact.

1. Whether legal paper and supplies are sold from the Jail commissary cart.
2. Whether Habeas Corpus forms are provided to inmates.
3. Whether inmates may receive law books and legal materials from visitors and outside sources.

XX. Jail Rules and Discipline.

A. Admitted Facts.

1. The stated written policy of the Sheriff's Department Custody Division and the Jail regarding discipline is as set forth in pre-marked Exhibits CF, Z (p. 20), A (pp. 75-84), B (p. 38), N, O, P, Q and R.
2. During the Jail's disciplinary process accused prisoners are not normally allowed to cross-examine or call witnesses.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants' rules and regulations which govern operation of the Jail and the actions and practices of officers and prisoners are not posted throughout the Jail and are not made available to all prisoners; and many prisoners are ignorant of the Jail's rules and regulations.
2. Whether many of the Jail's rules are unconstitutionally vague — giving no adequate notice of the conduct they are intended to prevent — and are selectively enforced by defendants; and other rules governing pretrial prisoners' conduct are petty and irksome and amount to excessive invasions of personal privacy.
3. Whether some rules are enunciated by officers on an *ad hoc* basis, frequently after an "offense" has allegedly occurred; and these rules necessarily vary from officer to officer, according to his mood and/or feelings towards the

prisoners involved.

4. Whether standardized punishments exist for violation of Jail rules.

5. Whether entire groups or housing areas of prisoners are punished for an infraction allegedly committed by one of their number.

6. Whether punishment includes loss of privileges, forced labor and solitary confinement.

7. Whether punishment may be levied for an indefinite period of time.

8. Whether defendants impose punishment upon prisoners without adequate notice or fair hearing or opportunity for prisoners to speak on their own behalf, confront their accusers, or otherwise contest the charges against them.

9. Whether for purposes of punishment defendants confine prisoners not only in disciplinary isolation cells but also in administrative segregation, protective custody, medical restraint cells and medical isolation cells, without even the pretense of due process.

C. Defendants' Contentions of Facts.

1. Whether as defendants contend: The Central Jail disciplinary procedures comply with the requirements of due process and contain adequate safeguards against erroneous action; printed rules are distributed to each inmate at the time of booking into the facility; the rules are printed both in English and Spanish; when an inmate is accused of violating a jail rule and if disciplinary actions are initiated, the inmate receives both oral and written notice of what he is accused of; the observing officer often orally informs the inmate of what he is accused, talks to the inmate, and conducts an appropriate investigation; if the incident is minor, the officer may merely admonish the inmate; if the observing officer believes that further action is appropriate,

the senior deputy is notified; the senior deputy again advises the inmate of what he is accused of, interviews him and listens to whatever defense he has and conducts an investigation; if the senior deputy believes further action other than admonishing is appropriate, the inmate is given a written notice of what he is accused of which informs him in English and Spanish of his potential punishment and that he will be given a hearing before a disciplinary review board and an opportunity to present a defense; the observing officer's version of the facts are placed upon an inmate incident report by the senior deputy and the inmate's version or defense is also recorded thereon and the senior deputy makes a recommendation as to the appropriate sanction, if any; the inmate incident report is then forwarded to a sergeant who reviews the inmate incident report and who may, if appropriate, talk to the inmate again, conduct a further investigation, and has the discretion to overturn or modify the recommended sanction; the inmate incident report is then forwarded to the watch commander who has the discretion to talk to the inmate, conduct an additional or further investigation, and to overturn or modify the recommendation for appropriate sanction.

2. Whether as defendants contend: If the watch commander agrees that some sanction involving loss of privileges should occur, the inmate incident report is forwarded to the disciplinary review board; the disciplinary review board has the inmate brought before it and informs the inmate again of what he is accused of and what the officers have said in their report; the disciplinary review board determines that the inmate is competent to present a defense and marks this determination on the form given to the inmate; the inmate is given an opportunity to present a defense and the matter is discussed with the inmate; if the inmate indicates that there are other persons or evidence that may

clear him, the disciplinary review board conducts further investigation; and the disciplinary review board makes a determination as to whether the accusation is founded or unfounded and so indicates in writing on a form given to the inmate.

3. Whether the inmate incident report, together with the findings, are forwarded to the facility commander who has the discretion to conduct a further investigation or overturn any decision.

4. Whether as defendants contend: The inmate may, in addition, send a sealed written letter of grievance to the facility commander; and the disciplinary review board follows a written standard of appropriate standardized punishments.

5. Whether as defendants contend: The disciplinary sanctions potentially available are not onerous; by state law, disciplinary reviews are limited to loss of privileges, and assignment of extra duties, (Minimum Jail Standards, Title 15, California Administrative Code, §1172, "Forms of Discipline"); state law prohibits disciplinary segregation for periods in excess of ten days without a finding and a new charge of violation of the facility's rules and regulations; state law also prohibits the withholding of mail privileges except for violation of mail rules; even when an inmate is transferred to disciplinary segregation, the transfer is not onerous; as a practical matter, such disciplinary segregation transfers the inmate to a disciplinary cell which is exactly the same as a regular housing cell and he loses visiting privileges and an opportunity to purchase items from the store; and he is permitted to retain legal materials.

XXI. Classification.

A. No Admitted Facts.

B. Plaintiffs' Contentions of Fact.

1. Whether although there are considerable differences between living conditions and privileges available to prisoners in different parts of the Jail and there are enormous

differences in the propensity for assaults and escapes posed by prisoners within the Jail, defendants make little or no attempt to classify prisoners; let alone classify prisoners in a manner that accords with due process of law.

2. Whether as a result of defendants' failure to classify, pretrial prisoners are all treated as though they pose serious dangers to Jail security, and the general pretrial prisoner population is exposed to assault and bullying at the hands of the more violent of their number.

C. Defendants' Contentions of Fact.

1. Whether as defendants contend: The Central Jail is presently implementing a new classification system which is the result of several years of study and planning; such system was presented to the Court in its initial planning stages in the case of *Dillard v. Pitchess*; under this classification system, it is intended and hoped that all inmates, regardless of their status as sentenced or pretrial inmates, will be classified as minimum, low moderate, moderate, high moderate or maximum security inmates; the classification is based upon an objective point system which gives weighted consideration to an inmate's current charge, criminal history, amount of bail, employment status at the time of arrest, residence within the County, family ties and other matters; when the system becomes fully operative, inmates will be so classified within a few days of their incarceration at Central Jail; and this system is to begin operating May 23, 1977.

2. Whether as defendants contend: Present indications are that when fully implemented, such classification system will permit the classification and housing of substantial numbers of the pretrial inmates as minimum security, and as high moderate security, as moderate security, and as high moderate security and only a small percentage as maximum

security; present data suggests that when implemented, such a classification system may ideally permit those pretrial inmates classified as minimum security to qualify for dormitory housing and permit travel about the jail on an unescorted basis; those inmates classified as low moderate to have relatively free movement in cell blocks, and open dayrooms, if possible; those inmates classified as high moderate to be housed in cell blocks with constant access to the freeway and scheduled dayroom time; and those inmates classified as maximum security to be housed in cell blocks with scheduled freeway time.

XXII. Supervision of Prisoners by Jail Officers.

A. Admitted Facts.

1. The stated written policy of the Sheriff's Department Custody Division and the Jail regarding Jail Officers' supervision of prisoners is as set forth in pre-marked Exhibits Z (pp. 1, 6), A (pp. 43, 51-53), and BM.

2. The stated written policy of the Sheriff's Department Custody Division and the Jail with regard to training of Jail Officers is as set forth in pre-marked Exhibits CD, BZ, B and A (pp. 20-21).

3. Most Sheriff's Academy graduates are placed in a jail facility as a first assignment.

B. Plaintiffs' Contentions of Fact.

1. Whether defendants fail to provide adequate supervision of prisoners within housing areas; and consequently prisoners suffer beatings, assaults and threats from fellow prisoners, and commit suicides.

2. Whether the Jail's Officers are too inexperienced and inadequately trained to supervise the lives of prisoners; and the Sheriff's Department Academy curriculum heavily emphasizes police work and only superficially touches correctional work within a Jail environment.

XXIII. Brutality, Harassment and Abuse.

A. Admitted Facts.

1. The stated written policy of the Sheriff's Department Custody Division and the Jail regarding abuse of prisoners is as set forth in pre-marked Exhibits B (p. 7), CR, BU (pp. 1-2, 6, 8-9), BH, Z (pp. 3-5), A (pp. 14-19), AE, AF, AG and AK.

B. Plaintiffs' Contentions of Fact.

1. Whether the defendants subject prisoners to a reign of terror, the principal ingredients of which are a widespread pattern and practice of threats, unprovoked assaults and verbal abuse of prisoners by Jail Officers, a lack of due care for prisoner safety at the hands of other prisoners, inadequate officer supervision and a failure to vigorously classify prisoners.

XXIV. Other Issues — Scope of Bifurcation.

A. The Problem.

1. Plaintiffs wish to challenge three practices, travel to and from the Los Angeles County-U.S.C. Medical Center, housing conditions in the Jail's hospital and Jail Officers' alleged obstruction of prisoners' access to medical personnel.

2. Defendants contend that the Court's bifurcation of the trial of this case between medical and non-medical issues precludes plaintiffs from litigating said three issues because defendants' defense would require expensive medical testimony and proof.

B. Plaintiffs' Contentions of Fact.

1. Whether housing in the Jail's infirmary, described in Plaintiffs' Contentions of Fact X-B-3, *supra*, is punitive and inadequate.

2. Whether prisoners taken to the Los Angeles County U.S.C. Medical Center suffer hardships and deprivations

similar to those arising from court appearances — by being awakened early in the morning, spending long days in holding tanks at the Jail and the Medical Center, and frequently returning exhausted to the Jail in the evening.

3. Whether Jail Officers deny prisoners access to medical personnel during sick call and at other times.

C. Defendants' Contentions of Fact.

1. Defendants reserve additional legal or factual contentions regarding the proper scope of the bifurcation and the trial of said three issues for the Pretrial Conference.

XXV. Comparison to Other Correctional Facilities.

A. No Admitted Facts.

B. Plaintiffs' Contentions of Fact.

1. Whether the policies, practices, and conditions which the defendants inflict on pretrial detainees are incredibly egregious in view of the fact that convicted prisoners in the Jail itself, in other Los Angeles County jail facilities, and in California state and federal prisons are treated considerably better than the Jail's pretrial prisoners; although the lives of convicted prisoners are far from idyllic, convicts do not face the same oppressive confinement and boredom experienced by the Jail's pretrial detainees; and convicts generally live in superior housing and have daily opportunity to exercise, recreate, entertain themselves indoors and outdoors; and almost universally convicts are permitted to have physical contact with their visitors.

XXVI. Exhibits.

A. Plaintiffs.

Plaintiffs' present list of exhibits, excluding rebuttal and impeachment exhibits, is attached hereto as Schedule B.

B. Defendants.

Defendants' present list of exhibits, excluding rebuttal and impeachment exhibits, is attached hereto as Schedule C.

C. Exchange of Exhibits.

1. All exhibits known to the parties have been exchanged or will be exchanged as soon as is practicable and not later than ten (10) days before trial without good cause.

2. The parties will disclose to each other rebuttal and impeachment exhibits, including those discovered during trial, as soon as is practicable.

3. The parties will file a statement of their respective positions on the admissibility of the other side's exhibits ten (10) days before trial or ten (10) days after receipt of copies of such exhibits whichever is later.

XXVII. Contentions of Law.

A. Jurisdiction.

The parties stipulate that jurisdiction is conferred upon this Court by 28 U.S.C. §1343 providing jurisdiction in District Courts over claims for redress of civil liberties arising under 42 U.S.C. §1983.

B. All Other Contentions of Law.

The parties' remaining extensive and voluminous contentions of law are set forth in their respective Memoranda of Contentions of Fact and Law, which, for purposes of convenience, are incorporated hereby by reference as though fully set forth.

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

DATED: June 27, 1977.

/s/ William P. Gray
WILLIAM P. GRAY
DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:

/s/ Terry Smerling
TERRY SMERLING

Attorney for Plaintiffs

DATED: June 13, 1977

/s/ Frederick R. Bennett
FREDERICK R. BENNETT

Attorney for Defendants

DATED: June 13, 1977.

(Schedule A, listing all jail cells by number, size, and location; Schedule B, Plaintiffs' Exhibit List; and Schedule C, Defendants' Exhibit List have been omitted from the Pretrial Conference Order in part because of difficulty in printing Schedule A, which is a handwritten ledger reduced in size, and Schedules B and C do not accurately reflect the exhibits at trial. All three schedules are set forth at pages 447 through 459 of the Clerks Record in the underlying appeal, USCA Docket No. 79-3061).

Stipulation.

United States District Court, Central District of California.
Dennis Rutherford, et al., Plaintiff, vs. Peter J. Pitchess,
et al., Defendants. No. CV 75-4111 WPG.

Filed: July 25, 1977.

In order to minimize the necessary trial time, the parties, through their respective counsel, the undersigned, stipulate as follows:

1. The affidavits submitted at the hearing on the preliminary injunction may be admitted into evidence as the direct testimony of the affiant in lieu of oral direct testimony; provided, however, that any party may, if they desire, call such affiant and cross-examine such affiant as to the statements contained in the affidavit, or may call such affiant and question him orally as to any matter relevant to the action and otherwise admissible.

2. Should any party request to so examine any such affiant orally and such person not be available or reasonably capable of being brought to court for such examination, such affidavit may not be admitted into evidence in lieu of oral direct testimony.

DATED: 7/19/77

JOHN H. LARSON, County Counsel

By /s/ Frederick R. Bennett

FREDERICK R. BENNETT

Deputy County Counsel

Attorneys for Defendant

DATED: 7/20/77

/s/ Terry Smerling

TERRY SMERLING

Attorney for Plaintiffs

IT IS SO ORDERED:

DATED: 7/25/77

/s/ William P. Gray

U. S. District Court Judge

**Judgment Reaffirming Judgment Entered
February 15, 1979.**

United States District Court, Central District of California.

Dennis Rutherford, Harold Taylor and Richard Orr, et al., Plaintiffs, vs. Peter J. Pitchess, et al., Defendants. Case No. CV 75-4111-WPG.

Filed: May 18, 1981.

On February 15, 1979, this court, after a trial of the class action here concerned, entered a judgment requiring several changes in practices and conditions of confinement in the Los Angeles County Central Jail (the jail). Three of these requirements were appealed. On August 8, 1980, the Court of Appeals remanded the case to this court for reconsideration of the three challenged orders in light of *Bell v. Wolfish*, 441 U.S. 520 (1979), which was decided after those orders were rendered.

The three orders here concerned read as follows:

"2.(b) *Contact Visits*. Commencing not more than ninety days following the date of this order, the defendants will make available a contact visit once each week to each pre-trial detainee that has been held in the jail for one month or more, and concerning whom there is no indication of drug or escape propensities; provided, however, that no more than fifteen hundred such visits need be allowed in any one week. In the event that the number of requested visits in any week exceeds fifteen hundred, or such higher number as the Sheriff voluntarily undertakes to accommodate, a reasonable system of rotation or other priorities may be maintained. The lengths of such visits shall remain in the discretion of the Sheriff."

"5. *Restoration Of Windows*. Within ninety days following the filing of this order, transparent windows shall be restored in each portion of the jail from which

they previously have been removed.”

“8. *Cell Searches.* Inmates that are in the general area when a ‘shakedown’ inspection of their cells is undertaken shall be permitted to be sufficiently proximate to their respective cells that they may observe the process and respond to such questions or make such requests as circumstances may indicate.”

For reasons set forth in the Memorandum of Decision filed contemporaneously herewith, the previously entered judgment is hereby reaffirmed.

DATED: May 18, 1981.

[Stamp] William P. Gray
WILLIAM P. GRAY
United States District Judge

No. 83-317

Supreme Court, U.S.
FILED

OCT 17 1983

ALEXANDER L. STEVAS
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term 1983

SHERMAN BLOCK, Sheriff of the County
of Los Angeles, et al.,

Petitioners,

v.

DENNIS RUTHERFORD, et al.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRED OKRAND
(Counsel of Record)
ACLU Foundation of Southern
California
633 South Shatto Place
Los Angeles, CA 90005
(213) 487-1720

JOHN H. HAGAR, JR.
444 Lincoln Boulevard
Suite 319
Marina del Rey, CA 90291

Attorneys for Respondents

QUESTIONS PRESENTED

Whether this Court should grant certiorari to review the Court of Appeals' judgment affirming the judgment of the District Court, precise and tailored to the special conditions of the Los Angeles County Central Jail, providing for

1. contact visitation on a limited schedule of a limited number of low-risk pretrial detainees and
2. the opportunity for inmates, who are in the general area when a search of their cells is undertaken, to be sufficiently proximate so that they may observe the process and respond to questions or make requests.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	1.
TABLE OF AUTHORITIES.....	iii.
STATEMENT OF THE CASE.....	1.
REASONS FOR DENYING THE WRIT	
Preliminary Statement.....	7.
1. The Decision Below Concerning Contact Visitation Involves A Limited Order Based Upon the Conditions Peculiar To The Los Angeles County Central Jail, Does Not Raise Significant Legal Issues Of General Application And Is Not In Conflict With Decisions of Other Courts of Appeal.....	8.
2. The Decision Below Concerning Cell Searches Does Not Conflict With Any Applicable Decision of This Court..	11.
CONCLUSION.....	13.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
BELL V. WOLFISH 441 U.S. 520 (1979).....	passim
INMATES OF ALLEGHENY COUNTY JAIL V. PIERCE 612 F.2d 754 (3rd Cir. 1979).....	10
JACKSON V. BISHOP 404 F.2d 571, 579 (8th Cir. 1968).....	7
JONES V. DIAMOND 636 F.2d 1364, 1377-78 (5th Cir. 1980) (en banc), <u>cert.dismissed</u> , 453 U.S. 950 (1981).....	10
JORDAN V. WOLKE 615 F.2d 749 (7th Cir. 1980).....	9
RAMOS V. LAMM 639 F.2d 559 (10th Cir. 1980) <u>cert.den.</u> 450 U.S. 1041 (1981).....	9
RUTHERFORD V. PITCHESS 457 F.Supp. 104 (C.D. Cal. 1978).....	2
WEST V. INFANTE 707 F.2d 58 (2nd Cir. 1983).....	10

No. 83-317

In The
SUPREME COURT OF THE UNITED STATES
October Term 1983

SHERMAN BLOCK, Sheriff of the County
of Los Angeles, et al.,

Petitioners,

v.

DENNIS RUTHERFORD, et al.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a class action against Los Angeles County officials on behalf of inmates in the Los Angeles County Men's Central Jail. The Central Jail is used primarily for the housing of male detainees awaiting trial on criminal charges while the numerous other jail facilities in the geographically widespread Los Angeles County system are used for sentenced inmates. However, the Central Jail also houses some sentenced prisoners. Although there is rapid turnover of short-term prisoners at the Central Jail, a substantial portion of its pretrial population is a

relatively stable group which spends months in the Jail pending resolution of the charges. Seventy five percent of the pretrial detainees housed in the Central Jail are accused of offenses which require three to four months to process in the Los Angeles County courts so that on any given day fully seventy-five percent of the Jail's population is facing three months or more of incarceration. In the universe of pretrial detainees both booked and released during the year of 1977, 1,290 inmates were held more than 180 days and 4,798 were held between 61 and 180 days. Respondents Rutherford, Taylor, and Armstrong were pretrial detainees for thirty-nine months, thirty-three months and fifteen months respectively.

After 17 days of trial, the District Court, in a reported decision (Rutherford v. Pitchess, 457 F.Supp. 104 [1978]. Pet. Appx. 41¹/ and in an unreported supplemental memorandum opinion preceded by 4 days of post-trial hearings Pet. Appx. 29, ordered a number of changes in jail conditions.²/ The County accepted most of them but appealed three, two of them being the issues presented by the petition for writ of certiorari.

During the pendency of the initial appeal to the Ninth Circuit, this Court issued Bell v. Wolfish, 441 U.S. 520 (1979). The Ninth Circuit determined that although "the District Court articulated standards that track closely those the Supreme Court subsequently laid down," the appropriate disposition was to remand to the District Court for reconsideration in light of Wolfish. (Memorandum Opinion filed August 8, 1980; Pet. Appx. 17 at 20)

¹/ "Pet. Appx." refers to appendix to the the petition for writ of certiorari.

²/ At the same time the court rejected respondents' contentions in a number of matters. See footnote 6, infra.

On remand the District Court carefully re-examined in light of Wolfish its decision on the three issues which had been appealed, recognized that some difference in analysis was required, and concluded that no change in result was indicated. The District Court reaffirmed its previous order (Memorandum of Decision, May 18, 1981; Pet. Appx. 23). The County again appealed.

The challenged orders, which have been stayed pending appeal, require that the jail administrators: (1) allow low-risk detainees who are imprisoned for more than one month^{3/} to receive one contact visit per week, up to a maximum of 1,500 such visits per week; (2) permit available inmates to observe, under certain specified conditions (Pet. Appx. 35), searches of their cells.^{4/}

3/ Originally the court was of the view that contact visitation should be allowed low risk pretrial detainees after two weeks of incarceration because the classification of the detainees is completed within that time. (Pet. Appx. 38-39) However, after the post-trial hearings the time was lengthened to one month. (Pet. Appx. 33)

4/ The third order appealed from, which the court below reversed (Pet. Appx. 15), required the reinstallation of windows which respondents had cemented shut. The actual wording of the two orders affirmed by the Ninth Circuit (ibid.) is:

2. Visitation

"...
...(b) Contact Visits. . . . [D]efendants will make available a contact visit once each week to each pretrial detainee that has been held in jail for one month or more, and concerning whom there is no indication of drug or escape propensities; provided however, that no more than fifteen hundred such visits need be allowed in any one week. In the event that the number of requested visits in any week exceeds fifteen hundred, or such higher number as the Sheriff voluntarily undertakes to accommodate, a reasonable system of rotation or other priorities may be maintained. The length of such visits shall remain in the discretion of the Sheriff." (Pet. Appx. 38)

8. Cell Searches

Inmates that are in the general area when a 'shakedown' inspection of their cells is undertaken shall be permitted to be sufficiently proximate to their respective cells that they may observe the process and respond to such questions or make such requests as circumstances may indicate." (Pet. Appx. 40)

In its analysis of the County's blanket restriction against any form of contact visitation, the District Court rejected, because of the potential security burdens and the physical limitations of the Central Jail, contentions by respondents that unlimited contact visits should be provided (Pet. Appx. 32). At the same time the Court expressed concern over the adverse psychological effects caused by the lack of physical contact with family members over prolonged periods of time, effects supported by the evidence presented at trial (Pet. Appx. 31). After carefully reviewing the potential security problems created by contact visitation, examining the modest physical alterations that would be necessary, and considering the length of time spent in the jail by sizable portions of the inmate population, the District Court concluded that the loss of contact over a prolonged period was an unreasonable and exaggerated response by the County. (Pet. Appx. 25-26.) Its conclusion was based upon solid evidence in the record. Experts testified as to the importance of contact visitation, the punitive nature of denying it, its effectiveness as a potent disciplinary measure because prisoners exercise self control in order to preserve it, that it can be conducted without jeopardizing institutional security. Even the Sheriff's own witness, Lt. Lonergan, conceded the absence of institutional necessity for depriving the inmates of the privilege; that it was only the matter of resources that prevented implementation of contact visits at the jail.

It was in the light of this record that the narrow order above described was entered. (Pet. App. 38.)

The Court below likewise recognized the restraints of this Court's decision in Wolfish (Pet. Appx. 4). It

acknowledged that contact visitation is not constitutionally mandated for all detainees in all facilities (Pet. Appx. 8). However, it also concluded that the denial of all contact visitation may be an unreasonable, exaggerated response to legitimate non-punitive objectives of the institution and is not per se beyond court scrutiny, if the court recognizes the important security interest of the institution, and at the same time evaluates the punitive psychological effects which the prolonged loss of contact visitation has upon detainees. Ibid. It concluded that the District Court had fashioned a narrowly drawn order, based upon the evidence in the case, which recognized the capacities, limitations, and security risks of the particular facility involved and which should not be reversed. Ibid.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

In constructing the narrow order requiring available inmates to be permitted to observe and make inquiries during unannounced searches of their own cells, the District Court limited its ruling to those inmates near enough to observe and raise or answer any relative inquiry. (Pet. Appx. 35) The order does not restrict in any manner the right of jail administrators to pursue unannounced searches, nor does it limit searches when affected inmates are not in the general area (at meal service, exercise, or at court). The order was fashioned only after the District Judge visited the jail and personally observed four alternate methods of cell searches. (Pet. App. 36, 9.) The order requires that Central Jail administrators make one minor modification to their present procedure of searching all of the cells in a row (while inmates in that row are contained in a day room) by having available inmates returned to the cell area, one at a time, to observe the search of their respective cells, at the conclusion of which they are locked in their cells and the remaining cells searched in the same manner. Thus there can be no frustration of the searches as was the case in Wolfish.

The evidence presented at trial, the limited nature of the order, Fourteenth Amendment due process concerns, the potentially punitive manner in which unobserved cell searches are conducted, the minor modification of procedures necessary to carry out the change, and the trial court's affirmation of the right of jail administrators to carry out searches led the Ninth Circuit to conclude that the District Court paid proper deference to the jail administrators' concerns about

security, and it affirmed the limited modification of Central Jail search procedures. (Pet. Appx. 9-12).

REASONS FOR DENYING THE WRIT

Preliminary Statement

This is not a case of a trial court disregarding the teachings of this Court in Wolfish and other cases and making "'judgment calls'" that "are confided to officials outside of the Judicial Branch of government." (Wolfish, supra, 441 U.S. at 562.) Rather it is a case of a conscientious court limiting its rulings to the particular conditions that violated the Constitution. While the trial court did require a number of changes made necessary by the "sordid aspects" (Ibid.) of the Los Angeles County Jail, changes which the County accepted and did not appeal,^{5/} it likewise refused to interfere with conditions which, though deleterious, did not in the court's judgment rise to the constitutional deprivation which would have permitted court intervention.^{6/}

^{5/} Such as having a mattress and bed or bunk on which to sleep (Pet. Appx. 37); a few minutes (15) within which to eat (Pet. Appx. 40); a place to sit down while waiting long periods of time to be taken to court (Pet. Appx. 39).

^{6/} Such as installation of upright lengths of steel pipe which effectively ruined the recreation area on the rooftop of the County Jail so that it could not be used as a basketball court (Pet. Appx. 52); limited sleeping space despite an earlier finding that the multiple occupancy cells "present poor examples of the civilized standards and concepts of dignity, humanity and decency to which Justice Blackmun made reference in Jackson v. Bishop" (404 F.2d 571, 579 [8th Cir. 1968]) (Pet. Appx. 46). In this connection it is not amiss to point out that the cell space the trial court allowed is less than 25 square feet of floor space per man, an amount far less than the 40 square feet prescribed by California's Minimum Jail Standards and a number of cases (Pet. Appx. 45-47). The court also allowed and refused to change a practice in the jail whereby, under certain circumstances, detainees were required to sleep on the floor for one night. (Pet. Appx. 37-38) It permitted petitioners' outdoor recreation schedule of only 2 1/2 hours per week, conceding that this is considerably less than what other courts had required. (Pet. Appx. 50-51) It refused greater access to law library facilities (Pet. Appx. 63). It denied brutality claims (Pet. Appx. 64). And even as to violations of the order the court had made, the court required the inmate to exhaust an administrative procedure before the court would entertain any application for contempt. (Pet. Appx. 40-41)

Both the trial court (Pet. Appx. 24-25) and the court below in affirming (Pet. Appx. 3-4) paid scrupulous attention to this Court's teachings in Wolfish and properly held that petitioners' blanket refusal under all circumstances to allow contact visitation or to allow search observation was unreasonable, excessive and an exaggerated response to legitimate institutional concerns.

1. The Decision Below Concerning Contact Visitation Involves A Limited Order Based Upon the Conditions Peculiar To the Los Angeles County Central Jail, Does Not Raise Significant Legal Issues of General Application and Is Not In Conflict With Decisions of Other Courts of Appeal.

- a. The District Court, in fashioning its limited contact visitation order, based its decision on conditions peculiar to the Central Jail. (Pet. Appx. 48-49). The District Court and Ninth Circuit opinions that the County's blanket restriction against all forms of contact visitation for all detainees regardless of classification status over prolonged periods of time represented an unreasonable and exaggerated response were based upon the specific physical structure of the Central Jail, the length of time that pretrial detainees are held in the Central Jail, and the security considerations of Central Jail administrations. This analysis is fully consistent with the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Wolfish, supra, 441 U.S. at 546. The District Court's judgment was based upon the specific facts that were presented, it did not promulgate rules of general application, and its factual analyses were not and should not be questioned upon appeal.

- b. The legal analysis of the District Court and the Court below concerning the blanket restrictions on contact visitation in the Central Jail does not differ from post-

post-Wolfish decisions of other circuits, even those cases which reached the opposite result. Of the cases cited at page 6 of the Petition for Writ of Certiorari, five are post-Wolfish. The instant case is in conflict with none of them.

In Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) cert.den. 450 U.S. 1041 (1981) the plaintiffs complained of a contact visitation policy that allowed kissing, hand holding, and the holding of children on the inmate's lap, a policy very different from the thick glass shields, power phones and the lack of contact here. The affirmance by the Tenth Circuit of the trial court's denial there to a policy of unlimited (and unknown) contact can hardly be said to be contrary to the order at bar. Moreover, in Ramos, a certain class of inmates, those in segregated units, was denied all contact visitation. They complained of this absolute prohibition and were rejected by the court. (639 F.2d at 580, fn.26) Likewise in the case at bar, Judge Gray rejected the claims for contact visitation of a large number of inmates. (Pet. Appx. 32) Thus, the cases do not collide.

The denial of contact visitation in Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980) was based on proof that extensive new facilities and the hiring of additional personnel would be needed and that only five percent of detainees remained in that facility for more than thirty days.^{7/} In contrast, 75% of the pretrial detainees in the Central Jail of Los Angeles County face three months or more of incarceration and the trial court's limited order applies only to low-risk detainees who have been incarcerated for more than 30 days.

^{7/} This Court in Wolfish pointed out at least four times (441 U.S. at 543, 552, 555, 562) that its decision on the facts of that particular case was influenced by the generally short duration of incarceration of the pretrial detainees.

The denial of contact visitation in Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979) was based on conditions and security problems peculiar to that institution. The affirmance by the Court of Appeals of the trial court's order there was simply that "[t]he district court chose to credit that testimony [concerning the contraband problem in that particular jail] and we cannot say that its decision was clearly erroneous." (612 F.2d at 754)

Jones v. Diamond, 636 F.2d 1364, 1377-78 (5th Cir. 1980) cert.dismissed, 453 U.S. 950 (1981) is, of course, not in conflict with the case at bar. The court there did just what the trial court did here. "Whether or not contact visitation rights should be accorded pretrial detainees can be decided only after a full hearing on the facilities available in both jails and the security requirements in each. . . . What we require is an evidentiary hearing to which the Bell v. Wolfish due process standard may be applied." (636 F.2d at 1364)

And the latest case cited by petitioners (West v. Infante, 707 F.2d 58 [2nd Cir. 1983]) is likewise in accord, not in conflict, with the case at bar. There a pretrial detainee in the Albany County Jail filed suit for damages against the sheriff because of the denial of the right to have contact visits with his family and friends. The trial court dismissed the action for failing to state a claim upon which relief could be granted. The Court of Appeals reversed, holding that the question as to whether the plaintiff had been deprived of the right complained of had to be decided not as a matter of law, but based upon the development of facts on "a proper record." (707 F.2d at 59)

It is to be remembered that in the case at bar neither the trial court in its limited and tailored order (Pet.

Appx. 38), nor the Court below in its affirmance (Pet. Appx. 8), held that contact visitation is mandated for all detainees in all facilities. To the extent that petitioners here claim that the courts below so did and therefore are in conflict with other circuits, they are clearly in error. There is no conflict warranting this Court's review.

2. The Decision Below Concerning Cell Searches Does Not Conflict With Any Applicable Decision of This Court.

Petitioners claim (Pet. 6) that the trial court's order here is in conflict with this Court's decision in Wolfish. That is not the case. The District Court's order modifying present procedures for cell searches allows for available individual inmates who had been removed from their row and secured in a nearby dayroom, to be returned to observe, one at a time, the search of their individual cell and then be locked up in it. It in no way restricts the discretion of the Central Jail administrators to perform "shakedowns" at any time, to search without restriction the cells of inmates at meals, court or exercise, nor does it alter present practices of removing inmates from the cell rows being searched, nor does it limit the right to search personal items as well as cell units. The District and Appellate decision reversed in Wolfish, represented "a challenge to the room-search rule in its entirety, and the lower courts have enjoined the practice itself." (441 U.S. at p. 557, footnote 38). The decision in this case does not present a similar issue.

Moreover, the actual method in use at the Metropolitan Correctional Center discussed in Wolfish, was such that the inmates could "frustrate the search by distracting personnel and moving contraband from one room to another ahead of the search team." (441 U.S. at 555). There is no such

possibility here. The trial judge personally observed four alternative methods presented by petitioners and chose the one (Method C) which satisfied both the needs of the jail and the Constitutional rights of the inmates. Specifically acknowledging this Court's admonition in Wolfish, (Pet. Appx. 27), he said (ibid): "Having witnessed the comparative ease and institutional security and safety under which a prisoner can be allowed to observe the search of his cell, it seems to me that to refuse such observation is contrary to the Due Process Clause of the Fourteenth Amendment."^{8/}

Finally, it is to be remembered that the attack in Wolfish, in addition to being on the entire concept of unannounced cell searches themselves, was based upon the Fourth Amendment. That is not the basis of the order here. After recalling that he had first hand witnessed two instances where the observation by the inmate prevented his property from being improperly confiscated (Pet. Appx. 36), the trial Court said (Pet. Appx. 28): "Due process, after all, means fair treatment under the circumstances. I believe that to allow these prized possessions to be confiscated under subjectively enforced regulations, without giving the possessor any opportunity to explain or protest or entreat, deprives him of his property without due process of law." Certainly Bell v. Wolfish does not contradict that principle.

^{8/} What the judge said about that visit bears repeating and demonstrates the constitutional correctness of the order.

[W]hile I was watching the search of that very cell, one of the deputies started to remove a magazine as not being sufficiently current and thus in violation of regulations designed to minimize fire danger by preventing accumulation of old periodicals. Upon being asked to reconsider, the deputy found that it was not as old as he had thought and left it. The same deputy started to discard another magazine on the ground that it lacked a cover. The inmate urged him to riffle the pages a bit; he did; the cover thereupon appeared; and the magazine stayed in the cell.

These are small matters; but they are important to the detainees, and their legitimate interests in protecting their meager possessions outweigh the small increase in the burden upon the defendants. (Pet. Appx. 36)

CONCLUSION

While it is true that in Wolfish, this Court said (441 U.S. at 525) that its analysis does not turn on the particulars of the Metropolitan Correctional Center concept or design, it is nevertheless also true that the Court felt the particular facts important enough to point out (Ibid.) that "The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates . . . [R]esidential units . . . replace the traditional cellblock jail construction. Each unit . . . has several clusters or corridors of private rooms or dormitories radiating from a central 2-story 'multipurpose' or common room, to which each inmate has free access 16 hours a day." So the facts of the particular institution are important. The trial court's orders attacked here are carefully tailored with reference to the particulars of the Los Angeles County Central Jail. This Court should not spend its time or energy reviewing them. No general principles are at stake; there are no conflicts between the circuits; there is no conflict with any applicable decision of this Court.

The Petition for Writ of Certiorari should be denied.

Dated: October 14, 1983

Respectfully submitted,

FRED OKRAND
JOHN H. HAGAR, JR.

Attorneys for Respondents

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, certify that I am a citizen of the United States, a resident of the State of California, County of Los Angeles, over the age of 18, and not a party to the within entitled action; my business address is 633 South Shatto Place, Los Angeles, California 90005.

On October 14, 1983, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on all parties required to be served by depositing three copies thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in a United States Post Office facility regularly maintained by the Government of the United States at Los Angeles, California, addressed to each of said parties or their attorneys

of record as follows: Donald K. Byrne
Chief Deputy County Counsel

Frederick Bennett
Principal County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

I am employed by Fred Okrand, a member of the Bar of this Court and a member of the State Bar of California, at whose direction this service was made. I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on October 14, 1983.

LYNDA HALL

MOTION
OCT 17 1983

No. 33-317

In The
SUPREME COURT OF THE UNITED STATES
October Term 1983

SHERMAN BLOCK, Sheriff of the County
of Los Angeles, et al.

Petitioners,

v.

DENNIS RUTHERFORD, et al.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

MOTION OF RESPONDENT DENNIS RUTHERFORD FOR
LEAVE TO PROCEED IN FORMA PAUPERIS IN
DEFENSE AGAINST PETITION FOR WRIT OF
CERTIORARI AND AGAINST WRIT OF CERTIORARI
IF GRANTED; DECLARATION IN SUPPORT

FRED OKRAND
(Counsel of Record)
ACLU Foundation of
Southern California
633 South Shatto Place
Los Angeles, California 90005
(213) 487-1720

JOHN H. HAGAR, JR.
444 Lincoln Blvd., Ste. 319
Marina del Rey, CA 90291
(213) 396-3481

Attorneys for Respondents

In The
SUPREME COURT OF THE UNITED STATES
October Term 1983

SHERMAN BLOCK, Sheriff of the County
of Los Angeles, et al.

Petitioners,

v.

DENNIS RUTHERFORD, et al.

MOTION OF RESPONDENT DENNIS RUTHERFORD FOR
LEAVE TO PROCEED IN FORMA PAUPERIS IN
DEFENSE AGAINST PETITION FOR WRIT OF
CERTIORARI AND AGAINST WRIT OF CERTIORARI
IF GRANTED; DECLARATION IN SUPPORT

Pursuant to Rule 46.1 of the Rules of this Court,
motion is hereby made that respondent Dennis Rutherford be
allowed to proceed in forma pauperis before this Court for
the reasons stated in the attached declaration. On March 14,
1979 the District Court entered an order allowing respondent
to defend the appeal in forma pauperis.

Dated: October 14, 1983

FRED OKRAND
JOHN H. HAGAR, JR.

By

Fred Okrand
Attorneys for Respondents

DECLARATION OF DENNIS RUTHERFORD IN SUPPORT
OF MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS IN DEFENSE AGAINST PETITION FOR
WRIT OF CERTIORARI AND AGAINST WRIT OF
CERTIORARI IF GRANTED

I, Dennis Rutherford, declare:

I am one of the respondents in the within action.

In support of my motion to proceed in my defense against the petition for writ of certiorari and against the writ of certiorari, if granted, without being required to prepay costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I am entitled to redress; and that the issues I am required to resist are:

Whether this Court should grant certiorari to review, and, if granted, to reverse, the lower court's judgment affirming the judgment of the trial court, precise and tailored to the special conditions of the Los Angeles County Jail, providing for (1) contact visitation of a limited number of pretrial detainees and (2) the opportunity for inmates to be present and observe and, if necessary, make inquiries during, searches of their cells under carefully circumscribed conditions which make it impossible for inmates to frustrate the searches.

I further declare that the responses which I have made to the questions below relating to my ability to pay the cost of defending this proceeding are true.

1. Are you presently employed?

No. Last employment about a year ago receiving about \$400 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or

other source?

No.

3. Do you own any cash or checking or savings account?

No checking or savings account. Have \$50.00 in cash.

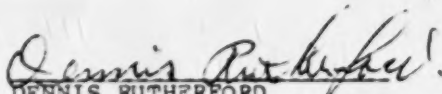
4. Do you own any real estate, stocks, bonds, notes, automobile, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California this 15th day of September, 1983.


DENNIS RUTHERFORD

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, certify that I am a citizen of the United States, a resident of the State of California, County of Los Angeles, over the age of 18, and not a party to the within entitled action; my business address is 633 South Shatto Place, Los Angeles, California 90005.

On October 14, 1983, I served the within MOTION OF RESPONDENT DENNIS RUTHERFORD FOR LEAVE TO PROCEED IN FORMA PAUPERIS IN DEFENSE AGAINST PETITION FOR WRIT OF CERTIORARI AND AGAINST WRIT OF CERTIORARI IF GRANTED; DECLARATION IN SUPPORT

on all parties required to be served by depositing a true copy thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in a United States Post Office facility regularly maintained by the Government of the United States at Los Angeles, California, addressed to each of said parties or their attorneys of record as follows:

Donald K. Byrne
Chief Deputy County Counsel
Frederick R. Bennett
Principal Deputy County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

I am employed by Fred Okrand, a member of the Bar of this Court and a member of the State Bar of California, at whose direction this service was made. I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on October 14, 1983.

LYNDA HALL

Office-Supreme Court, U.S.
FILED

DEC 22 1983

ALEXANDER L. STEVAS,
CLERK

No. 83-0317
IN THE

Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK, *et al.*,

Petitioners,

vs.

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PETITIONERS' OPENING BRIEF.

FREDERICK R. BENNETT,
Principal Deputy County Counsel,
Office of the Los Angeles
County Counsel,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1880,

Counsel for Petitioners.

Petition for Certiorari filed August 23, 1983.
Certiorari granted November 7, 1983.

Questions Presented.

1. Whether jail inmates have a constitutional right to contact visitation?
2. Whether jail inmates have a constitutional right to be present to observe and make inquiries during general searches of their cells?

Parties.

Petitioners herein are:

SHERMAN BLOCK, Sheriff of the County of Los Angeles, successor in office to Peter J. Pitchess, Appellant below; FRED E. STEMRICK, Assistant Sheriff, successor in office to William Anthony, Appellant below; JAMES W. PAINTER, Chief of the Los Angeles County Sheriff's Department Custody Division, successor in office to John Knox, Appellant below; RON BLACK, Captain Central Jail, successor in office to James White, Appellant below; EDWARD EDELMAN, KENNETH HAHN, and PETER SCHABARUM, Supervisors of the County of Los Angeles and Appellants below; DEANE DANA and MICHAEL D. ANTONOVICH, Supervisors of the County of Los Angeles, as successors in office to James Hayes and Baxter Ward, Appellants below.

Respondents herein are:

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	i
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Case	2
1. Procedural History	2
2. Factual Background	4
3. Reasoning of Courts Below	7
Summary of Argument	8
1. Standard of Review	8
2. Contact Visits	9
3. Cell Searches	11
Argument	12
1. The Courts Below Misapplied the Principles of <i>Bell v. Wolfish</i> in Finding That the Challenged Conditions Were Such Exaggerated Responses to Security Concerns That They Would Support an Inference of Punitive Intent	12
2. The Prohibition of Contact Visits Is Not Founded on an Express Intent to Punish, and Is Directly Related to Genuine, Serious Security Concerns	16
3. The Record Does Not Support the Court's Conclusion That the Prohibition of Contact Visits at the Jail Was Such an Exaggerated Response to Security Concerns That Punitive Intent May Be Inferred	17

4. To the Extent the Denial of Contact Visitation Might Implicate Other Constitutional Rights, Such as the Freedom of Association, the Sheriff's Program of Daily Non-Contact Visits, Combined With Other Alternatives for Maintaining Relationships Through Unlimited Mail and Regular Unmonitored Telephone Calls, Is a Reasonable, Non-Content Restrictive, Time, Place, and Manner Regulation Justified by Compelling Security Concerns	21
5. The Weight of Existing Authority and Strong Policy Considerations Favor Deferring to Jail Administrators the Sensitive Decision Whether to Permit Contact Visitation	23
6. The Decision Below Concerning Cell Searches Is Indistinguishable in Terms of Reasoning and Relief Ordered From That Rejected in <i>Wolfish</i>	27
Conclusion	32
Appendix. Constitutional and Statutory Provisions	App. p. 1
United States Constitution, Amendment 14	1
United States Code, Title 28, §§ 1343, 2201, 2202	1
United States Code, Title 42, § 1983	2

TABLE OF AUTHORITIES

Cases	Page
Ahrens v. Thomas, 570 F.2d 286 (8th Cir. 1978)	24
Bell v. Wolfish, 441 U.S. 520 (1979)	3, 5, 8
..... 9, 11, 12, 13, 14, 15, 16, 20, 21, 23, 25, 31	
Campbell v. McGruder, 416 F.Supp. 100 (D.D.C. 1975), aff'd in part, 580 F.2d 521 (D.C. Cir. 1978)	24
Cooper v. Morin, 49 N.Y.2d 69, 399 N.E.2d 1188 (1979)	24
Detainees of Brooklyn House of Detention v. Malcolm, 421 F.Supp. 832 (E.D.N.Y. 1976)	24
Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978)	21, 23
Forts v. Malcolm, 426 F.Supp. 464 (S.D.N.Y. 1977)	24
Gallego, In re, 133 Cal.App. 3d 75 (1982)	24
Guajardo v. Estelle, 432 F.Supp. 1373 (S.D. Tex. 1977)	20
Hutchings v. Corum, 501 F.Supp. 1276 (W.D. Wyo. 1980)	24
Inmates of Allegheny Cnty. Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979)	23
Inmates of Sybil Brand Inst. for Women v. County of Los Angeles, 130 Cal.App. 3d 89 (1982)	24
Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981), cert. granted sub nom., Ledbetter v. Jones, 452 U.S. 954 (1981)	24, 25
Jones v. Wittenberg, 440 F.Supp. 60 (N.D. Ohio 1977)	24
Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980)	24
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	14
Ledbetter v. Jones, 453 U.S. 950 (1981)	25

	Page
Lock v. Jenkins, 464 F.Supp. 541 (N.D. Ind. 1978), rev'd in part, 641 F.2d 488	24
Marcera v. Chindlund, 595 F.2d 1231 (2d Cir. 1979), vacated, Lombard v. Marcera, 442 U.S. 915 (1979)	25
McGinnis v. Royster, 410 U.S. 263 (1973)	20
Miller v. Carlson, 401 F.Supp. 835 (M.D. Fla. 1975), aff'd, 563 F.2d 741	24
Mitchell v. Untreiner, 421 F.Supp. 886 (N.D. Fla. 1976)	24
O'Bryan v. County of Saginaw, 437 F.Supp. 582 (E.D. Mich. 1977)	24
Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975)	23, 24
Pell v. Proconier, 417 U.S. 817 (1974)	24
Proconier v. Martinez, 416 U.S. 396 (1974)	21, 22
Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980)	24
Rhem v. Malcolm, 396 F.Supp. 1195 (S.D.N.Y.), aff'd, 527 F.2d 1041 (2d Cir. 1975)	24
United States ex rel. Wolfish v. Levi, 439 F.Supp. 114 (S.D.N.Y. 1977)	27, 28, 29, 30, 31, 32
West v. Infante, 707 F.2d 58 (2d Cir. 1983)	24

Constitution

United States Constitution, Fourteenth Amendment, Sec. 1	1, 8, 11
---	----------

Rule

Federal Rules of Civil Procedure, Rule 53	25
---	----

Statutes

California Penal Code, Sec. 4000	4
United States Code, Title 28, Sec. 1254(1)	1
United States Code, Title 28, Sec. 1343	1, 2

	Page
United States Code, Title 28, Sec. 2201	1, 2
United States Code, Title 28, Sec. 2202	1, 2
United States Code, Title 42, Sec. 1983	1, 2

OPINIONS BELOW.

The following Opinions, decisions, and judgments of the District Court and the Court of Appeals appear in the Appendix to the Petition for Certiorari ("PA") and the Joint Appendix ("JA"), as referenced.

<i>Filed</i>		<i>Location</i>
7/25/78	Reported Memorandum Decision of the District Court, <i>Rutherford v. Pitchess</i> , 457 F.Supp. 104 (C.D. Cal. 1978)	PA 41
2/15/79	Unreported Supplemental Memorandum Decision of the District Court	PA 29
2/15/79	Unreported Judgment of the District Court	PA 37
8/8/80	Unreported Memorandum Opinion of the Court of Appeals	PA 17
5/18/81	Unreported Memorandum Decision of the District Court	PA 23
5/18/81	Unreported Judgment of the District Court	JA 93
7/14/83	As yet unreported Opinion of the Court of Appeals	PA 1

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 14, 1983, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The following constitutional and statutory provisions appear in the appendix hereto:

United States Constitution, Amendment 14, Section 1.

United States Code, Title 28, Sections 1343, 2201, 2202.

United States Code, Title 42, Section 1983.

STATEMENT OF THE CASE.

1. Procedural History.

The present action was filed in 1975 alleging jurisdiction under 28 U.S.C. § 1343 for a claim under 42 U.S.C. § 1983 for injunctive and declaratory relief pursuant to 28 U.S.C. §§ 2201, 2202, as a class action challenging a wide range of conditions of confinement at the Los Angeles County Men's Central Jail.

After a trial, the District Court issued its Memorandum Decision ("Mem. Dec. 1," 2/15/79, PA 41) granting a wide range of injunctive relief. The Sheriff was granted a rehearing concerning several issues, including the Court's orders requiring contact visits¹ for certain inmates, and certain procedures for searches of inmate housing areas. As a result of the rehearing, the District Court issued a Supplemental Memorandum Decision ("Supp. Mem. Dec.," 2/15/79, PA 29), *inter alia*, (1) requiring pretrial inmates² confined longer than 30 days and concerning whom there is no indication of drug or escape propensities, to be permitted one contact visit a week, up to a maximum of 1,500 such visits a week for all such inmates; and (2) requiring that available inmates be permitted to observe and make

¹The term "contact visits" is an imprecise term, rarely defined by the courts, and is commonly used to describe a wide range of visitation practices from arrangements permitting unrestricted physical contact, kissing and embracing in an outdoor setting to arrangements where inmates and visitors are separated by five foot partitions which preclude any significant tactile contact (Loneragan, RT (11/9/78) 4435-38). While the order involved in this case is not specific (See Judgment, JA 93), the Court clearly contemplated an arrangement whereby an inmate would have the opportunity to "embrace his wife or hug his children" (Mem. Dec. 2, 5/18/81, PA 25).

²"Pretrial inmates" is used generally to describe inmates held in jail while awaiting or engaged in a pending criminal trial. As used by the Court it includes inmates convicted of one or more charges and engaged in a trial on other charges (JA 59, para. IV. A.2).

inquiries during general searches of their own cell areas.
(*Id.*)

The Sheriff appealed three of the District Court's orders, including the orders concerning contact visits and cell searches.³ The other orders were not appealed.

In an unpublished Memorandum Opinion filed August 8, 1980 (PA 17), the Court of Appeals remanded the appealed orders to the District Court for reconsideration in light of the intervening decision in *Bell v. Wolfish* (1979) 441 U.S. 520 ("Wolfish"), finding that while the judicial standard of review of conditions of pretrial detention applied by the District Court tracked closely the standard promulgated by the Supreme Court, the District Court observed that proof of the availability of less restrictive means of accomplishing security objectives demonstrated that jail officials had exaggerated their response to security concerns, a mode of analysis rejected in *Wolfish* (PA 20). In remanding the matter the Court of Appeals indicated that the District Court could apply the *Wolfish* standards without further trial on the facts (*id.*).

On remand, and without further evidentiary hearing, the District Court, in an unreported Memorandum Decision filed May 18, 1981 ("Mem. Dec. 2," PA 23), acknowledged that *Wolfish* required some differences in analysis, but concluded it required no difference in result, and reaffirmed its previous orders, finding the categorical rejection of contact visitation exceeded the reasonable requirements of security, and that the ordered search procedures were a necessary prophylactic against improper seizure of inmates' property.
(*Id.*)

³The third appealed order required reinstallation of former windows at the jail. That order was ultimately reversed by the Court of Appeals (Op., PA 1, 12-14), and is not involved in the present proceedings.

The Sheriff again appealed, and the Court of Appeals affirmed the orders with regard to contact visits and cell searches (PA 1). These orders have been stayed during appeal.

2. Factual Background.

Central Jail is one of seven jail facilities and numerous minor facilities operated by the Sheriff of Los Angeles County (JA 55, para. V. A.1) who is charged with the duty of housing, *inter alia*,⁴ all persons in the County charged with crime and committed for trial or sentenced to imprisonment in the county jail (*cf.* California Penal Code § 4000). He serves a county with a population in excess of 7,000,000 people living in an area of over 4,000 square miles (JA 55, para. V. A.1). The entire jail system receives more than 200,000 prisoners a year, most of whom are in the Sheriff's custody less than 10 days, and has an average daily population of over 9,000 inmates, male and female. (*Id.*)

Central Jail, a large, air conditioned three story building built in 1963, and the new addition thereto which became operational shortly before trial, is located in downtown Los Angeles, a few miles from the Civic Center Courts (Anthony Affidavit, CT 216, (Dk. 3061),⁵ admitted in evidence by stipulation, JA 91). It is a major facility, with a rated capacity in excess of 5,000 inmates, and is the primary County facility for housing male pretrial detainees, most of whom

⁴Pursuant to state law, persons detained as witnesses or held under civil process, or committed for contempt are also housed at county jails. California Penal Code § 4000.

⁵By order filed 8/21/81 the Court of Appeals in the present appeal (Dk. No. 81-5461) permitted the records from the prior appeals (Dk. No.'s 79-3061 and 79-3367) to be used. The clerk's record will be referenced to the appropriate appeal by docket number.

"remain at the jail only for a few days or weeks"* (Supp. Mem. Dec., PA 32). Central Jail is the entry and exit point for all male prisoners in the jail system and serves as the central staging area for all inmates, male and female, who are transported to court daily (Mem. Dec. 1, PA 55-60). Each weekday the Sheriff transports between 700 and 1,000 inmates to 26 separate jurisdictional courts located over the wide expanse of the County, and back to the Jail after court (JA 73, para. XV. A.1).

Inmates are housed in cell blocks and dormitories pursuant to a classification system, and travel to centralized meals, medical services, visiting, attorney visits, recreation, school, church services, and other activities either unescorted or in groups monitored by one or a few deputies (JA 68, para. V. A.1; Lonergan, RT (11/9/78) 4447:7-12).

The visitation procedures found constitutionally inadequate permit daily, unmonitored visits with adults and chil-

*Neither the District Court nor the Court of Appeals made more specific findings on the average length of confinement or on the range of the length of confinement. The Court of Appeals mentioned "prolonged" confinement (Op., PA 5-6). The District Court order regarding contact visits implies at least 1,500 inmates in custody over 30 days. Due to idiosyncrasies in the Jail's computer system, the fact that during their incarceration inmates may be transferred to other jail facilities in the County jail system for part or most of their confinement, or may be released on bail and return to custody upon revocation of bail, or rearrest on other charges, or that inmates may be awaiting trial on one charge while serving sentences on other charges, makes exact statistics infeasible (RT 11/9/78, 4454-67). The plaintiffs contend that a sizable number of inmates remain in custody between 60 and 180 days or more (Appellees' Brief, docket No. 81-5461, pp. 6-7), and that 3 to 4 months or more may be required to process charges against some inmates charged with serious felonies (*id.*). Consistent with the Court's finding that most inmates remain at the jail only for a few days or weeks (Supp. Mem. Dec. 2, PA 32), it is reasonably clear that Central Jail is a relatively short-term facility, particularly when compared to state prisons where the stay for all inmates is one year or more. Cf. *Bell v. Wolfish*, *supra*, n.3 at 441 U.S. 524, where 27% of the MCC inmates remain in custody for some unspecified period in excess of 60 days.

dren 12 hours a day between the hours of 8:30 a.m. and 8:30 p.m.; the number of such visits average over 2,000 a day, over 63,000 a month (JA 61-62, para. VII. A.2). To accommodate such visits, there is a large, air conditioned visiting area designed to accommodate 228 visitors at one time, that is generally in constant use throughout the day (Lonergan Affidavit, CT 268:5-8 (Dk. No. 79-3061), admitted by stipulation, JA 91). The visiting area is arranged in corridors designed to minimize noise between rows, and privacy partitions are located between each visiting location to likewise reduce noise, and provide some element of privacy (*id.*, CT 268:8-11). Visitors and inmates are separated by 22" x 32" clear glass panels and speak over telephones (*id.*, CT 268:11-14). An area to sit and a shelf is provided on both the inmate and visitor sides for convenience and comfort (*id.*, CT 268:14-16).

No direct supervision of each visitor or inmate is done or required (*id.*, CT 268:17-19). Since visitors never enter the jail or come in contact with the inmates, the large number of visits can be accomplished with no prior appointments, screening, or approved visitor lists, and uninhibited by intrusive security measures (*id.*). Mail may be sent to and received from any person (JA 59, para. V. A.1). By virtue of another of the District Court's orders, each inmate has regular opportunities to make unmonitored telephone calls to whomever he wishes (Mem. Dec. 1, PA 60).

Under the search procedures found constitutionally inadequate by the Court, cell areas were searched while all inmates were out of the cell areas for other activities such as meals, exercise or the like. Under the ordered procedures, all inmates are to be removed to a separate dayroom area, and the available occupants of particular cells brought back to observe and make inquiries during the search of their particular cell (JA 94).

3. Reasoning of Courts Below.

Although the District Court recognized that “any program of contact visits does increase the importation of narcotics into the jail despite *all* safeguards and precautions” (Supp. Mem. Dec., PA 31; emphasis added) and the Sheriff’s concerns about the possibility of the introduction of weapons, escape attempts, and hostages (*id.*, PA 32), the Court was equally impressed with the importance of physical contact with family members for prisoners detained for prolonged periods (*id.*, PA 31). Finding the Sheriff’s categorical rejection of contact visits for all inmates at Central Jail to be an unreasonable, exaggerated response to the security concerns, the Court concluded that “[m]odest alteration within the jail *presumably* could provide appropriate space (for contact visits)”, and that by limiting the number of such visits to no more than 1,500 a week for prisoners not determined to be drug or escape risks “the scope, burden, and dangers of the program would be substantially reduced” (Supp. Mem. Op., PA 33; emphasis added).

Although it was admitted that regular cell searches are necessary (JA 72, para. XII. A.2), the prisoners contended they were conducted in a manner which results in leaving the cells in disarray and improper confiscation of their property (JA 72, paras. XII. B.1-2). Although not specifically resolving the conflicting evidence as to the prisoners’ contentions (Mem. Dec. 1, PA 60-61), the District Court concluded that allowing inmates to observe the searches “ ‘would go far to eliminate these grounds of complaint’ ”, would motivate the officers to “ ‘fulfill the stated duty to put things back as they were’ ”, and a claim of “ ‘stolen property is far less likely to be made, the grounds for suspicion, or ostensible suspicion, being largely eliminated’ ” (Mem. Dec. 1, PA 61).

In affirming with regard to contact visits and searches, the Court of Appeals, acknowledging the principles promulgated in *Wolfish*, viewed a court's proper role in evaluating jail restrictions as finding the mutual accommodation between the institution's needs and the interests of detainees, who have not yet been convicted of any crime, in exercising their retained constitutional rights.

With regard to contact visits, the Court of Appeals concluded that while contact visitation is not constitutionally mandated for all detainees in all facilities, the District Court properly accommodated the jail's security interests with the adverse psychological effects caused by the lack of physical contact with family members over prolonged periods of time in concluding that a blanket restriction on contact visits for all detainees at Central Jail was an unreasonable, exaggerated response to security concerns at that facility.

With regard to the search procedures, the Court of Appeals, with one dissent, found that the District Court's conclusion that the ordered search procedures did not permit inmates to frustrate the search, and the District Court's reliance on due process rights of the inmates, distinguished the holding of this Court in *Wolfish* reversing the similar search procedures ordered by the District Court in that case.

SUMMARY OF ARGUMENT.

1. Standard of Review.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court promulgated a test of the constitutional validity of jail conditions affecting pretrial detainees. Where a condition implicates the 14th Amendment's protection against deprivation of liberty without due process, the proper inquiry is whether the condition amounts to punishment. A condition is punitive if there is a showing of an express intent to punish. Otherwise, if a particular condition is reasonably related to

a legitimate non-punitive objective, it does not, without more, amount to punishment. Legitimate objectives include maintaining security, order, discipline, and facilitating the effective management of the facility. Where a condition implicates another constitutional right, as well, a court must assess whether the condition impermissibly infringes that right. In making that assessment the court must recognize that the essential goals of maintaining security and preserving internal order may require limitation on the constitutional rights of detainees, and must grant wide-ranging deference to prison administrators in the adoption of policies to serve these goals.

The courts below did not find an express intent to punish as to either of the challenged orders, and did not find that the restrictions on contact visits or cell searches implicated constitutional rights other than the due process clause. Rather, as to both restrictions, the lower courts found that the Sheriff's response to admitted security concerns were exaggerated, and inferred an intent to punish.

In doing so, the lower courts misapplied the principles of *Wolfish*, merely disagreeing with the Sheriff about the extent of the security concerns and the means required to deal with them.

2. Contact Visits.

Given the unique and clear opportunity contact visitation presents for the introduction of drugs and weapons, for escape, hostages, and injury despite all safeguards, the denial of such visits should not be considered such an exaggerated response to permit the inference of punitive intent.

Moreover, the record does not support the Court's conclusion that the denial of contact visits is such an exaggerated response to security concerns that punitive intent may be inferred.

Although recognizing the risks in any program of contact visitation, the court felt that modest alteration of the jail or busing the inmates to another facility, and limiting the number of such visits to 1,500 a week for low risk classified inmates would substantially reduce the scope, burden, and dangers.

The Court was unable to articulate exactly what alterations could be made to the Jail to feasibly permit contact visits. The alternative of busing the inmates to another facility is impractical in light of the fact that the Sheriff is already required to transport one fifth of the Jail's population daily to 26 separate jurisdictional courts located over the wide expanse of the county, a process necessarily fraught with considerable security problems, and one which the Court found involves such a strain on inmates and staff that it alone rose to constitutional proportions.

Any classification system will miss serious risks. In addition, the design of the Jail, where inmates have considerable freedom of movement to varied centralized activities, and the daily need to commingle about one fifth of the Jail's population by court destination, precludes adequate separation of inmates to prevent those denied contact visits from using threats and violence to coerce those permitted contact visits to do their deeds for them.

The fact that other facilities permit contact visitation is not controlling, as there may be factors that make contact visitation more manageable there; and there may be legitimate differences of opinion as to what practices are safe within those institutions.

To the extent the denial of contact visitation implicates other constitutional rights, such as the freedom of association, the Sheriff's program of daily non-contact visits, combined with other alternatives for maintaining relationships

through unlimited mail and regular unmonitored telephone calls, is a reasonable, non-content restrictive, time, place and manner regulation justified by compelling security concerns.

3. Cell Searches.

The need for routine cell searches is not in dispute. Rather, the inmates complain that the searches are conducted in a manner which leaves their cells in disarray and results in the improper confiscation of property, facts which the Sheriff denies. Without fully resolving this factual dispute, the District Court determined that it was necessary to permit the inmates to observe the searches as a prophylactic against possible abuse.

The courts below sought to distinguish the holding of this Court in *Wolfish*, reversing a similar order, on the grounds that, unlike the District Court in *Wolfish*, the District Court here gave adequate weight to the administrator's concerns, and based its analysis, not on disapproved Fourth Amendment grounds, but on the due process rights of the inmates. The distinctions are without substance. Both the courts in *Wolfish* and this case considered similar security concerns but simply disagreed on the extent of those concerns and the means needed to meet them. Both courts relied in *haec verba* on the same reasoning. This Court rejected that approach in *Wolfish*, and should do so here. The Sheriff reasonable needs to conduct such searches out of the presence of the inmates to prevent inmates from interfering with the likelihood of locating dangerous contraband, to prevent disruption of the jail operation, and to avoid risk of harm to inmates and staff. Moreover, there is no compelling reason to believe that the inmates' presence will effectively deter abuse.

ARGUMENT.

1. **The Courts Below Misapplied the Principles of *Bell v. Wolfish* in Finding That the Challenged Conditions Were Such Exaggerated Responses to Security Concerns That They Would Support an Inference of Punitive Intent.**

As the Court of Appeals observed (Mem. Op., PA 19-20), *Bell v. Wolfish*, 441 U.S. 520 (1979), set forth the tests for evaluating constitutional attacks by pretrial detainees on conditions or restrictions during their confinement. "Where a condition implicates the fourteenth amendment's protection against deprivation of liberty without due process, the proper inquiry is whether the condition amounts to punishment." *Id.* at 538. A condition is punitive if there is a showing of express intent to punish. Otherwise, if a particular condition is reasonably related to a legitimate non-punitive objective, it does not, without more, amount to punishment. *Id.* Legitimate objectives include both insuring the detainee's presence at trial and facilitating the effective management of the facility. *Id.* at 539-40. Where a restriction implicates another constitutional right as well, a court must assess whether the condition or restriction impermissibly infringes that right. In making that assessment, however, the court must recognize that the essential goals of maintaining security and preserving internal order and discipline may require some limitation on the constitutional rights of detainees, *id.* at 546, and must grant wide-ranging deference to prison administrators in the adoption of policies to serve these goals. *Id.* at 547-58" (Mem. Op., PA 19-20).

Although espousing this test, neither the District Court nor the Court of Appeals applied it.

In its initial decision, the District Court, without benefit of this Court's opinion in *Bell v. Wolfish*, formulated its own standard of review, which the Court of Appeals found tracked closely the test promulgated in *Wolfish*. The test applied by the District Court was "whether the challenged conditions or restrictions are *reasonably necessary* to the maintenance of security, order, and safety in the institution or whether they constitute an *exaggerated* response by the custodial officials to these considerations" (Supp. Mem. Dec., PA 30; emphasis added). Further elaborating this test, the Court observed that "if jail security and order can be protected by *less restrictive means*, the conditions and practices *must be deemed unreasonable as an exaggerated response*" (*Id.*, emphasis added). The Court of Appeals, in remanding the matter, correctly observed that this Court had rejected this "less restrictive means" mode of analysis (Mem. Op., PA 4).

The matter was remanded to the District Court for reconsideration, noting that the District Court could apply the *Wolfish* standards without further trial on the merits (Opinion, A 20).

No further evidentiary hearings were held. On remand the District Court acknowledged that *Wolfish* required some differences in analysis, but no difference in result, and reaffirmed its previous orders. The District Court concluded "that, regardless of how it is phrased the test still remains: 'What is reasonable under the circumstances?' " (Mem. Dec. 2, PA 25). The District Court opined that in all of its decisions in this action, the previous as well as the latest, the Court "was trying to find 'the mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application' " (*Id.*). Although reaching the very same result without further evidentiary hearings, the Court, in professed compliance to

the mandate of the Court of Appeals, disclaimed that it was relying upon the rejected doctrine that proof of the availability of less restricted means demonstrated that prison officials had exaggerated their response to security concerns (Mem. Op. Dec. 2, PA 28). Relying upon this Court's quote from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), that absent a showing of expressed intent to punish, the determination of whether a condition is impermissible punishment "generally will turn on 'whether an alternative purpose to which (the restriction) may rationally be connected is assignable for it, and whether it appears excessive in relationship to the alternative purpose assigned (to it.)' " *Wolfish*, *id.* at 539. The District Court concluded that each condition was excessive in relation to the alternative purpose, and therefore inferred an impermissible punitive purpose.

The validity of the District Court's determination devolves to whether its notion of "excessive" is consistent with the principles promulgated by this Court. This Court in *Wolfish*, and in prior decisions, provided considerable insight into those conditions that might support a finding of inferred punitive intent. This Court observed in footnote 20 in *Wolfish* "that in the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, *which may on its face appear to be punishment*, is instead but an incident of a legitimate non-punitive governmental objective. See *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168. [L]oading a detainee with chains and shackles may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation *so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods*, would not support a conclusion that the purpose for which they were imposed was to punish."

Wolfish, n. 20 at 539; emphasis added.

This footnote suggests that absent an express intent to punish, the condition must appear on its face to be punishment; that to find the response to legitimate objectives to be exaggerated, the condition itself must be very harsh, and employed to achieve objectives that could be accomplished by many alternative and less harsh means. In essence, there must be such obvious alternative, less harsh means of accomplishing the same purposes, that the means chosen are arbitrary and irrational.

The means chosen by the District Court and approved by the Court of Appeals may be reasonable approaches, but they are not the only reasonable means of providing opportunities for an inmate to visit with and maintain contact with family and friends. The means chosen by the Sheriff, which maximize the frequency of opportunity for visitation, coupled with alternative means of maintaining contact with family and friends through mail and regular phone calls, does not appear overly harsh nor necessarily even preferable to less frequent contact type visits as perceived by the Court. "Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional." *Wolfish*, *supra*, n. 25 at 543. Only in the clearest of cases should the inferred punishment prong of the *Wolfish* test result in invalidating a practice or condition that is directly and genuinely related to real, serious, and specific security concerns.

"[T]he problems that arise in the day-to-day operations of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. [Ci-

tations and footnotes omitted]. Such considerations are peculiarly within the province and professional expertise of corrections officials, and in the absence of *substantial evidence* in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." [Emphasis added]. *Wolfish, supra*, 547-48.

2. The Prohibition of Contact Visits Is Not Founded on an Express Intent to Punish, and Is Directly Related to Genuine, Serious Security Concerns.

It is clear from the record that the Court did not conclude that the Sheriff's prohibition of contact type visitation was founded on an express intent to punish. To the contrary the District Court recognized that "the Sheriff and his staff fully recognize the value of visitation" and commended them for "the attention and effort that they devote to accommodating such a large number of people" (Mem. Dec. 1, PA 50).

Nor can there be any doubt that the prohibition of contact visitation is directly related to real, serious, and legitimate security concerns. The Court recognized that the testimony "demonstrated clearly the great burden that would be imposed upon the jail authorities and the public if . . . contact visits were to be accorded all or most of the five thousand prisoners at the jail. Expensive construction would be required in order to create a new, large and secure visiting area that would be insulated from the jail and from the outside by sally ports. The processing of visitors would have to include careful identification, sometimes including interviews, personal searches and the checking of hand-carried articles. Prisoners necessarily would be strip-searched upon leaving the visiting area. Substantially increased numbers of guards would be required for visual surveillance and supervision. (Para.) This complicated, expensive, and time-

consuming process . . . inevitably would reduce far below the present level of two thousand per day the numbers of visits that could be accommodated" (Supp. Mem. Dec., PA 31).

The District Court further observed "that the establishment of *any* program of contact visits does increase the importation of narcotics into a jail, despite *all* safeguards and precautions" (*id.*, emphasis added), and recognized the Sheriff's concerns "about the increased possibility of the introduction of weapons and of escape attempts with the taking of hostages" (*id.*).

3. The Record Does Not Support the Court's Conclusion That the Prohibition of Contact Visits at the Jail Was Such an Exaggerated Response to Security Concerns That Punitive Intent May Be Inferred.

Notwithstanding the legitimate custodial interests underlying the Sheriff's determination not to permit contact visitation at Central Jail, the District Court concluded that the Sheriff should be able to adequately determine which inmates were narcotics or escape risks, that "[m]odest alteration within the jail *presumably* could provide appropriate space" [emphasis added], and that by limiting the number of such visits to no more than 1,500 a week, "the scope, burden, and dangers of the program would be substantially reduced" (Supp. Mem. Dec., PA 33).

These conclusions are rather gratuitous in light of the record.

The Sheriff maintained throughout the action that "[t]here are no rooms or facilities within the Central Jail or the new addition thereto that are feasible for conversion to use for contact type visits, even if the security risks were not present" (Lonergan Affidavit, CT 269:1-4 (Dk. 3061); admitted into evidence by stipulation; JA 91). There is little com-

elling evidence in the record to the contrary.⁷

On the date the Court issued its opinion and judgment reaffirming its orders concerning contact visits after remand, counsel for the Sheriff asked the Court directly what was contemplated by "modest alteration" (RT (5/18/81) 17:6 to 18:7). Counsel requested the Court to clear up this finding (*id.*, RT 18:25 to 19:6). The Court replied: "Mr. Bennett, that was two years ago. I had much better in mind the testimony, my views as to the physical matters. One thing that occurred to me is, if it's necessary it could be done as of that time, which would be, you can cart these people over to Biscailuz Center. Now, don't stick me with that. My only concern is that I believe that if the Sheriff wants to do it, he could find a way of doing it within the facilities he has with or without modest alterations. That's not my department" (*id.*, RT 19:7-16).

Although a facility might be built outside of the Jail, the physical arrangement and flow patterns of the Jail (Loneragan, RT (11/9/78) 4447:7-22; Sumner, RT (11/9/78) 4606:2-4608:13; *cf.*, Gaston, RT (11/8/78) 4316:2-4323:8), and the difficulty of adequately classifying such large groups of inmates make such a plan infeasible.⁸

⁷Virtually all of the experts, both plaintiffs' and defendants', agreed with the Sheriff that contact visits are not feasible in the existing structure (Loneragan, RT (11/9/78) 4540-4546; Sumner, RT (11/9/78) 4606:4-4608:13; Gaston, RT (11/8/78) 4322:23-4323:8; Nagel, RT (11/10/78) 4186:20-4187:14; Patterson, RT (11/10/78) 4593-4597). Only three suggested that such visits might be possible if a new elaborate satellite facility were constructed near the Jail to accommodate them (Patterson, *id.*; Nagel, *id.*; Gaston, *id.*). One of plaintiffs' experts suggested merely knocking out the glass in some or all of the existing 228 visiting positions (R.T. (11/9/78) 4595, Patterson), an approach which not only would eliminate significant visiting space of the other prisoners, but seems impractical as well (RT (9/23/77) 3746).

⁸Although the warden of San Quentin testified that he felt it was possible to cull out the great majority of risks, that some would always be missed, and would cause a lot of problems (Sumner, RT (11/9/78) 4609:11-4610:12).

The classification system at the Jail, although one of the most sophisticated in the country (Giger, RT (9/22/77) 3198, 3226; Gaston, RT (11/8/78) 4314:13-4315:9), is a housing classification system designed to segregate inmates as to the degree of freedom they can be permitted within a secure facility (Lonergan, RT (11/9/78) 4448:16-23), and is not designed to, and is not adequate to make the more difficult judgments required to safely permit contact visits in such an institution (Lonergan, RT (11/9/78) 4448:23-4449:2; 4450:24).

Even if the classification system worked for this purpose, the physical arrangement of the Jail precludes the necessary separation of inmates to prevent the transfer of contraband from those inmates permitted contact visits to those who are not. Central Jail was designed with a flow pattern where the inmates are allowed considerable freedom of movement, and the officers themselves are, for the most part, separated from the inmates, being locked, in essence, outside of the cell blocks, with the exception of prowl officers (Lonergan, RT (11/9/78) 4447:7-12). Preventing the commingling of various classifications of prisoners is almost impossible. Services such as eating, recreation, visiting, libraries, schools, medical care, and the like, are centralized, and inmates generally go to these activities either unescorted or in large groups supervised by only one or a few officers. Moreover, about one fifth of the pretrial inmates go to one of 26 separate jurisdictional courts each weekday, and are necessarily commingled by court designation for considerable periods of time (JA 73-74, paras. XV. A.1-2).

Even if only lower security inmates are permitted contact visits, within the custodial milieu, pressures are placed upon

such inmates by higher security inmates⁹ to accomplish their deeds for them (Sumner, RT (11/9/78) 4610:14-4611:5; cf. Gaston, RT (11/8/78) 4290:18-4291:2; 4293:23-4294:8).

Although the District Court suggested an alternative of busing the inmates elsewhere for such visits, it takes little imagination to visualize the impracticality of such an operation. The Court anticipated that the number of inmates might exceed 1,500 a week (Supp. Mem. Dec., PA 33). This logistics problem would be compounded by the fact that the Sheriff already is required to transport one fifth of the pretrial population (700 to 1,000 inmates) a day out of the Jail to 26 separate jurisdictional courts located over the wide expanse of the County and back again at night — a process which is necessarily fraught with considerable security problems,¹⁰ and one which the Court found involved such a strain on the inmates and staff that it alone rose to constitutional proportions (Mem. Dec. 1, PA 55-60).

Although contact visits are apparently feasibly permitted at many prisons,¹¹ and at some jails, that does not mean they are constitutionally required or feasible at Central Jail or any jail. "Certainly, the due process clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must

⁹The Jail has an unusually high concentration of violent prison gangs which seek to control narcotics traffic, and command considerable control over their members and others to commit acts of violence to achieve their purposes (Lonergan, RT (9/23/77) 3741-3745; Exhibits ES, ET; cf., Gaston, RT (11/8/78) 4325:15-4328).

¹⁰Cf., *Guajardo v. Estelle* (S.D. Tex. 1977) 432 F.Supp. 1373, 1380, where the court observed that "the constant flow of inmates in and out of the security perimeters of T.D.C. [a jail facility] does increase the precautions necessary to preserve prison order and security."

¹¹Cf., *Wolfish*, *supra*, 1878 at n. 28, where this Court observed that pretrial inmates may "present a greater risk to security and order" than sentenced inmates; *See also*, *McGinnis v. Royster* (1973) 410 U.S. 263, 270, where this Court commented upon the fundamental differences between prisons and jails.

be permitted at all institutions" (*Wolfish, supra*, at 1882). Cf., *Feeley v. Sampson*, 570 F.2d 364 (1st Cir. 1978): "That institution may be constructed so that contact visits are more manageable, or there may be other factors making such visits feasible there. There may even be legitimate differences of opinion among state and local authorities as to what practices are safe within their particular institutions."

4. **To the Extent the Denial of Contact Visitation Might Implicate Other Constitutional Rights, Such as the Freedom of Association, the Sheriff's Program of Daily Non-Contact Visits, Combined With Other Alternatives for Maintaining Relationships Through Unlimited Mail and Regular Unmonitored Telephone Calls, Is a Reasonable, Non-Content Restrictive, Time, Place, and Manner Regulation Justified by Compelling Security Concerns.**

Neither of the courts below identified any specific constitutional right that was implicated with regard to contact visitation other than the due process violation resulting from the inferred intent to punish. In their brief in the Court of Appeals, however, plaintiffs suggested that the denial of contact visits implicates the constitutional right to freedom of association belonging to prisoners and their visitors, citing *Procurier v. Martinez*, 416 U.S. 396, 408-9 (1974) (Appellee's Brief, Docket No. 81-5461, pp. 33 et seq.).

To the extent that the denial of physical contact during visitation implicates the freedom of association, as plaintiffs suggest, it is a permissible and reasonable, non-content restrictive, time, place, and manner regulation necessary to further significant governmental interests requiring limitation on the constitutional rights of detainees.

The most significant interference with family relationships is the fact of detention itself, to which the conditions

inherent in detention are clearly secondary.

Unlike the censorship of mail practices at issue in *Pro-cunier v. Martinez* (1974) 416 U.S. 396, upon which plaintiffs rely, there is no censorship of the content communicated to persons outside of the facility or with whom the communication may be had. To the contrary, and unlike the practice at many facilities that do permit some form of contact type visiting, the Jail administrators do not place any restrictions on whom the prisoners may visit, do not monitor the visits, and do not impose intrusive security measures that themselves are likely to have an adverse impact on family relationships. Unlike other facilities that significantly limit the frequency of visits, the Jail authorities permit visits on a daily basis for 12 hours a day, permitting an incredible 2,000 visits a day.

In addition to these relatively liberal visiting procedures, the prisoners may maintain their family relationships through the Jail's liberal mail practices, and by virtue of the District Court's order regarding telephones, have the opportunity to make regular unmonitored personal telephone calls.

While no doubt the ability to hug and touch a family member may be an important aspect of a familial relationship, as plaintiffs' experts testified, to focus on this aspect of the relationship alone is to lose sight of the entire picture, and is contrary to the appropriate role of the courts in dealing with detention conditions.

No one could reasonably contest that the frequency of visits with family members is likewise an important consideration in maintaining that relationship. Whether frequency or physical contact is the most important, no doubt could be the subject of some debate.

As the Court observed, the Sheriff recognizes the value of visitation, and the Court commended him for his efforts

in permitting such a large number of visits. Although disagreeing with the Sheriff on the extent of the impact on the frequency of visits caused by permitting some contact visitation, the Court clearly recognized that permitting contact visitation would have an impact upon the frequency of visits generally (Supp. Mem. Dec., PA 31). Although acknowledging the intrusive nature of the security measures that would be required to permit contact visits, the Court apparently concluded that such measures were an appropriate trade-off for the allowance of such visits.

The Court acknowledged the genuineness of the security concerns presented by contact visitation, but disagreed with the Sheriff as to the appropriate means of dealing with them.

In weighing all of these circumstances, the District Court obviously reached a different conclusion than did the Jail administrators. In such circumstances, "(p)roper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution" and the needs of the inmates. *Wolfish, supra*, n. 38.

5. The Weight of Existing Authority and Strong Policy Considerations Favor Deferring to Jail Administrators the Sensitive Decision Whether to Permit Contact Visitation.

Prior to and subsequent to this Court's opinion in *Wolfish*, courts at all levels remain in apparent conflict, at least in terms of results reached, as to whether contact visits are constitutionally mandated generally or at particular institutions, the weight of authority not requiring contact visitation. See, e.g., *Feeley v. Sampson*, 570 F.2d 364, 373 (1st Cir. 1978); *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 757-761 (3d Cir. 1979); *Oxendine v. Wil-*

liams, 509 F.2d 1405, 1407 (4th Cir. 1975); *Jordan v. Wolke*, 615 F.2d 749, 751 (7th Cir. 1980); *Ahrens v. Thomas*, 570 F.2d 286, 290 (8th Cir. 1978); *Ramos v. Lamm*, 639 F.2d 559, 580 (10th Cir. 1980). Cf., *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978); *West v. Infante*, 707 F.2d 58 (2d Cir. 1983); *Jones v. Diamond*, 636 F.2d 1363, 1377 (5th Cir. 1981); *Hutchings v. Corum*, 501 F.Supp. 1276, 1296 (W.D. Wyo. 1980); *Lock v. Jenkins*, 464 F.Supp. 541, 550 (N.D. Ind. 1978), rev'd in part, 641 F.2d 488, 498; *Cooper v. Morin*, 49 N.Y.2d 69, 399 N.E.2d 1188, 1192 (1979) (not required on federal grounds, but required on independent state grounds); *Inmates of Sybil Brand Inst. for Women v. County of Los Angeles*, 130 Cal.App. 3d 89, 110 (1982);¹² *In re Gallego*, 133 Cal.App. 3d 75. *Contra*, *Rhem v. Malcolm*, 396 F.Supp. 1195, 1199-1200 (S.D.N.Y.), aff'd, 527 F.2d 1041, 1043 (2d Cir. 1975); *Forts v. Malcolm*, 426 F.Supp. 464, 468 (S.D.N.Y. 1977); *Detainees of Brooklyn House of Detention v. Malcolm*, 421 F.Supp. 832 (E.D.N.Y. 1976); *Campbell v. McGruder*, 416 F.Supp. 100, 105 (D.D.C. 1975), aff'd in part, 580 F.2d 521, 547-48 (D.C. Cir. 1978); *Miller v. Carlson*, 401 F.Supp. 835, 893-95 (M.D. Fla. 1975), aff'd, 563 F.2d 741; *Mitchell v. Untreiner*, 421 F.Supp. 886, 906 (N.D. Fla. 1976); *O'Bryan v. County of Saginaw*, 437 F.Supp. 582 (E.D. Mich. 1977); *Jones v. Wittenberg*, 440 F.Supp. 60, 158-59 (N.D. Ohio 1977).

In *Pell v. Procunier*, 417 U.S. 817 (1974) this Court upheld a prison regulation prohibiting face-to-face inter-

¹²If the order requiring contact visitation at Central Jail is permitted to stand, male inmates of the County jail system will have an opportunity for such visits, but women inmates of the same jail system will not. Cf., *Inmates of Sybil Brand Inst. for Women v. County of Los Angeles*, 130 Cal.App. 3d 89, 110, upholding the Sheriff's denial of contact visitation at his women's facility.

views between inmates and the press.

This Court touched upon, but declined to decide the question of contact visits in *Bell v. Wolfish*, *supra*, 411 U.S. at 520, as the issue was not challenged in that appeal. However, this Court observed with regard to another issue, the validity of strip searches conducted to discourage smuggling of contraband during such visits, that the need for such searches could be obviated by abolishing contact visitation altogether. Thereafter, in another case, this Court reversed and remanded the issue of contact visitation for reconsideration by the Second Circuit in light of *Bell v. Wolfish*, *supra*; *Marcera v. Chindlund*, 595 F.2d 1231 (2d Cir. 1979), vacated, *Lombard v. Marcera*, 442 U.S. 915 (1979).

The question of contact visitation appeared to be presented for resolution with the granting of *certiorari* on that issue in *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981), *cert. granted sub nom.*, *Ledbetter v. Jones*, 452 U.S. 954 (1981); however, the matter was dismissed pursuant to Rule 53. *Ledbetter v. Jones*, 453 U.S. 950 (1981).

Not only does the weight of existing authority suggest that contact visitation is not required for jail inmates, but there are sound policy reasons for leaving the determination as to whether to permit contact visitation at a particular institution to that institution's administrators, and the laws and policies of the local governments where they are located.

Contact visitation presents a unique opportunity for the introduction of drugs, weapons, and contraband into a facility, as well as opportunities for escape, the taking of hostages, and injury to visitors, inmates, and staff. As the District Court observed "the establishment of *any* program of contact visits does increase the importation of narcotics into a jail, despite *all* safeguards and precautions" (Supp. Mem. Dec., PA 31; emphasis added). A similar conclusion

with regard to the other risks is supported by the record as well. On the other hand, the opportunity to embrace one's wife, hug one's children, or to have physical contact with persons that are emotionally close is likewise important, and may have tangential benefits within the facility in terms of reducing inmate tensions, easing the transition back to freedom, or facilitating ultimate rehabilitative efforts.¹³

Given the real and serious risks inherent in any program of contact visitation, the sensitive decisions weighing the risks and benefits, determining how much risk to assume and at what cost are the very type of decisions that are most appropriately left with those persons charged with and trained in the operation of the institution.

Certainly, courts should take action to ensure that constitutional rights are observed. But when the practice in question, such as here, is related so directly and inherently to genuine and serious security concerns, the court should be most reluctant to interfere with the jailor's assessment.

This analysis does not mean, as the Court of Appeal apparently feared, that an institution's security interests always predominate (Op., PA 8), nor does it ignore the importance of visitation to inmates, or the adverse psychological effects that might be caused by the lack of physical contact with family members, as testified to by plaintiff's experts.

It reflects, rather, a healthy sense of realism that the management and operation of a jail is difficult and intractable, involving sensitive judgments concerning the secure housing of persons confined against their will, to many of whom violence is no stranger, where the compulsion to

¹³It is not clearly unreasonable to believe that for many or even most inmates, such contact may enhance tension or add to the difficulty of coping with the enforced separation from their families.

obtain drugs and other contraband may override rationality, and where the cost of miscalculation may be human life, and its forfeit instant.

6. The Decision Below Concerning Cell Searches Is Indistinguishable in Terms of Reasoning and Relief Ordered From That Rejected in *Wolfish*.

Jail authorities conduct thorough searches of inmate cells and housing areas to locate contraband or other items not allowed in the cells (Mem. Dec. 1, PA 60-61) sometimes in the absence of prisoner occupants¹⁴ (JA 72, para. XII. A.1). The plaintiffs admit that such searches "are necessary to maintain the security of the facility, prevent escapes, maintain order, and minimize the potential for injury to inmates and staff" (JA 72, para. XII. A.2).

Under the former practice a team of officers would enter and search an entire housing area after the inmates were removed or were outside of their housing areas for other activities such as meals, recreation periods, or the like. In such fashion the searches could be conducted reasonably quickly with some frequency, with little disruption to the search, and without preventing the inmates from engaging in other activities occurring elsewhere in the jail.

Although admitting the necessity for such searches, the prisoners contend, as did the prisoners in *Wolfish* (*United States ex rel. Wolfish*, *supra*, 439 F.Supp. at 148-49) that their property was left in disarray, that items were unnecessarily removed and destroyed, and that valuable property

¹⁴As was the case in *Wolfish*, cell searches were of two types: general "shakedown" searches of entire housing areas, and searches of specific cells, usually based upon specific information or cause. Searches of individual cells may be in the presence of some inmates. Cf., *United States ex rel. Wolfish v. Levi*, 439 F.Supp. 114, 148 (S.D.N.Y. 1977). The Sheriff's written procedures are set forth in Exhibits BR, BO, A (pp. 18, 31-32), CC and DD (PCO, admitted facts, CTI 423:10-13).

was taken without a receipt being given (Mem. Dec. 1, PA 61). The Sheriff insisted that the searches were accomplished with minimum disruption to the inmates' possessions (*id.*).

In its initial decision, as with the lower court in *Wolfish*, without making specific findings resolving the conflicting testimony as to the manner in which the searches were conducted, the Court ordered that "[f]uture shakedowns should be made while the respective inmates remain outside their cells but near enough to observe the process and raise or answer any relevant inquiry" (Mem. Dec. 1, PA 61). In doing so the District Court relied, in *haec verba*, on the very reasoning of Judge Frankel, disapproved in *Wolfish*:

" 'Allowing inmates to observe from a reasonable distance the searching of their rooms would go far to eliminate these grounds of complaint. An officer viewed by the owner is more likely to fulfill the stated duty to put things back as they were. The claim of stolen property is far less likely to be made, the grounds for suspicion, or ostensible suspicion, being largely obviated. Having one's things searched is no pleasure in the best of circumstances. Being denied the right even to watch the invasion is a blunt oppression.' " (Mem. Dec. 1, PA 61).

In response to the Court's decision, the Sheriff developed four alternative procedures to comply with Court's order, and invited the Court to observe them in operation and to select the final procedure¹⁵ (Supp. Mem. Dec., PA 35). The

¹⁵This does not mean, as plaintiffs contended below, that the Sheriff endorsed any of the alternative plans in comparison to his invalidated procedures. The fact that the Sheriff attempted to develop and demonstrate a number of alternatives to the Court's order merely reflects his good faith effort to deal with the problems envisioned by the Court and is not an endorsement or acknowledgment of the acceptability of such alternative plans. *Cf.*, Supp. Mem. Dec., PA 39.

first demonstrated method, method A, involved searching all of the cells in a row while the inmates remained in the dayroom, a method similar to the Sheriff's invalidated procedure. In method C, the method ultimately endorsed by the Court, after all inmates were removed to a dayroom, the men occupying a particular cell were brought back from the dayroom and positioned under guard outside of their cell while it was being searched. When the search of that cell was completed, the men were locked in their cell and the remaining cells were searched successively in the same manner (*id.*). All agreed that the other two methods, methods B and A, were so unsatisfactory and expensive that they were rejected outright (*id.*).

Although the District Court found little difference between methods A and C in terms of time and expense (*id.*, PA 35-36), it is obvious that both methods A and C are far more complex, time consuming, and disruptive than the former procedures which permitted a team to search all or many of the cells at the same time, rather than one by one, without need to identify, escort, and guard the occupants of a cell as the search was conducted because all or most of the inmates were away from the housing area for meals or other activities.

The District Court and the Court of Appeals, with one dissent, sought to distinguish the intervening opinion of this Court in *Wolfish* holding that a similar order was not constitutionally required.

As ably pointed out in the dissent in the Court of Appeals (Op., PA 15-17), the distinctions are without substance.

First, the District Court and the Court of Appeals distinguished *Wolfish* on the grounds that the District Court in *Wolfish* didn't give adequate weight to the official's security concerns, including specifically the concern that inmates

would frustrate the search by distracting personnel and moving contraband ahead of the search team (Op., PA 10; Mem. Dec. 2, PA 27).

As pointed out by the dissent, however, "it is factually inaccurate to state that the District Court in *Wolfish* did not also weigh those concerns. See *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 148-49 (S.D. N.Y. 1977)" (Op., dissent, PA 16). The problem with the district courts' analysis, both in *Wolfish* and here, is that not sufficient weight was given to those concerns which were dismissed as speculative, not being supported by strong empirical examples (*Wolfish v. Levi*, *supra* at 149). The District Court's dismissal of the Sheriff's concerns in this case is little different.

The District Court did not deal at all with most of the security concerns of the Sheriff. The Sheriff offered testimony that permitting inmates to observe cell searches, even under the ordered procedure, would interfere with the likelihood of locating contraband,¹⁶ disrupt the jail operation,¹⁷ lead to friction between inmates and guards,¹⁸ create risk of harm to inmates and staff,¹⁹ and would be less efficient and more costly (Lombardi, RT 4120:20-23).

¹⁶If the inmates observe where and how searches are conducted, they learn how better to hide contraband (Lombardi RT 4116:17-19); and the concomitant notice of the search gives inmates an opportunity to dispose of or move the contraband (Lombardi, RT 4117:9-12; 4117:20-4118:10).

¹⁷By requiring more deputies who must leave other tasks elsewhere in the jail, and keeping inmates at one location, away from other activities, for long periods of time (Lombardi, RT 4118:17-4120:17).

¹⁸Inmates become upset and more likely to get into altercations with guards (Lombardi, RT 4116:21-24); and some inmates felt it was humiliating to have to watch their property being searched (Lombardi, RT 4133:3-9; 4133:19-21).

¹⁹Not only because of the altercations and friction, but because of the construction of the jail where the drop from the upper cell tiers to the cellrows below is guarded only by a low railing (Lombardi, RT 4134:20-24; cf., 4141:10-21; 4120:23-4121:11).

Second, the lower courts in this case sought to distinguish *Wolfish* on the grounds that the Court of Appeals in *Wolfish* did not identify the constitutional provision on which it relied, and the District Court in *Wolfish* found a fourth amendment violation which the Supreme Court ruled to have been in error. Here, it is contended that the District Court founded its decision on the due process clause, to discourage the improper handling and confiscation of inmate property. The distinction is inaccurate and erroneous. The Second Circuit in *Wolfish* explicitly noted that cell searches could give rise to a due process claim in certain circumstances. See 373 F.2d at 131, n. 29. More fundamentally, the District Court here relied in *haec verba* upon the very reasoning of the District Court in *Wolfish*, that permitting inmates to observe the searches would deter or eliminate the grounds for the inmates' concerns about mishandling and confiscation of their property. (Cf., *United States ex rel. Wolfish v. Levi*, 439 F.2d at 149; Mem. Dec. 1, PA 61).

Moreover, this Court specifically rejected the deterrent effect as a basis for requiring the inmates' presence during searches, noting that even if there were abuses by guards in handling the prisoners' property, that the litigation was not an action for damages, but an action to enjoin the search rule in its entirety. "When analyzed in this context, proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of detainees." *Wolfish*, *supra*, n. 38 at 441 U.S. 557.

Moreover, there is little reason to believe that permitting the occupants of a particular cell to observe the search of their cell would be as effective in deterring abuse as the District Court contemplated based upon its brief one-time

observation of the procedures and its brief inquiry of two inmates. Assuming that the deputies were motivated to regularly abuse the search procedures, one would certainly expect the presence, in the midst of litigation, of a federal judge, counsel, and supervisory staff to motivate the deputies to act with the utmost respect and discretion. Whether the presence of the few inmate occupants of a particular cell in less official circumstances would have similar deterrent effect is less certain. The effective deterrent to such inexcusable abuse of authority must be found elsewhere, through training, supervision or damage actions.

The lower courts in *Wolfish*, and the lower courts here considered the same concerns of both inmates and jail staff, and ordered the same relief. This Court rejected that approach in *Wolfish*, and it should reject it here, as well.

CONCLUSION.

For these reasons the Court should reverse the opinion of the Court of Appeals for the Ninth Circuit of July 14, 1983, affirming the Judgment of the District Court of the Central District of California of August 8, 1980, requiring the Sheriff of Los Angeles County to permit contact visitation, and to conduct routine cell searches in the presence of available inmates at the Los Angeles County Central Jail.

Respectfully submitted,

FREDERICK R. BENNETT,

Principal Deputy County Counsel,

Counsel for Petitioners.

APPENDIX.

Constitutional and Statutory Provisions.

United States Constitution, Amendment 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28.

§1343. Civil rights and elective franchise.

The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.
- (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

§2201. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202. *Creation of remedy.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

United States Code, Title 42.

§1983. *Civil Action for Deprivation of Rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

No. 83-317

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SHERMAN BLOCK, *et al.*,*Petitioners,*

v.

DENNIS RUTHERFORD, HAROLD TAYLOR,
RICHARD ORR,*Respondents,*On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**BRIEF OF RESPONDENTS**FRED OKRAND
(Counsel of Record)
ACLU Foundation of
Southern California
633 S. Shatto Place
Los Angeles, CA 90005
213-487-1720
JOHN H. HAGAR, JR.
444 Lincoln Blvd.
Marin Del Ray, CA 90291
213-396-3498ALVIN J. BRONSTEIN
EDWARD I. KOREN
ELIZABETH ALEXANDER
The National Prison Project
of the ACLU Foundation
1346 Connecticut Ave., N.W.
Washington, D.C. 20036
202-331-0500*Attorneys for Respondents*

QUESTIONS PRESENTED

1. Whether the Narrowly Tailored Contact Visitation Approved by the Court of Appeals to Prevent Impermissible Punishment of a Limited Number of Long-Term, Low-Risk PreTrial Detainees, and to Preserve the Constitutionally Protected Familial Rights of those Detainees and their Parents, Spouses and Children is Clearly Erroneous in the Context of the Totality of Conditions at the Los Angeles County Jail?

2. Whether the Ordered Cell Search Procedure, Initially Designed by Jail Officials, Approved by the Court of Appeals was an Appropriate Remedy to Prevent Deprivation of Prisoners' Property without Due Process of Law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	16
ARGUMENT	18
I. TOTAL PROHIBITION OF CONTACT VISITATION AT THE LOS ANGELES COUNTY JAIL CONSTITUTES IMPERMISSI- BLE PUNISHMENT OF UNCONVICTED PRETRIAL DE- TAINÉES IN VIOLATION OF THEIR RIGHTS UNDER THE DUE PROCESS CLAUSE.	18
A. The Due Process Clause Prohibits Punishment Of Pretrial Detainees.	18
B. Total Prohibition Of Contact Visitation For De- tainees Of The Los Angeles County Jail And Their Families Would Be Psychologically Harmful, Punitive In Effect, And Constitutes An Exaggerated Response To Security Prob- lems.	21
C. The District Court's Orders Must Be Assessed In The Context Of The Totality Of Conditions Extant At The Jail.	24
II. TOTAL PROHIBITION OF CONTACT VISITATION AT THE LOS ANGELES COUNTY JAIL INTERFERES WITH THE CONSTITUTIONALLY PROTECTED FAMILIAL RIGHTS OF DETAINEES AND THEIR FAMILIES.	26
A. Constitutionally Protected Familial Rights Are Impaired By The Denial Of Contact Visitation.	26
B. Analyzed Under The Strict Standard Applica- ble To Deprivations Of Familial Rights, Total Prohibition Of Contact Visitation At The Los Angeles County Jail Violates The Due Process Rights Of Detainees And Their Visitors.	31

Table of Contents Continued

	Page
III. THE DISTRICT COURT'S ORDER THAT DETAINEES BE ALLOWED TO OBSERVE SEARCHES OF THEIR CELLS PROPERLY REMEDIES DEPRIVATIONS OF DETAINEES' PROPERTY WITHOUT DUE PROCESS OF LAW.	33
CONCLUSION	37

TABLE OF AUTHORITIES

CASES:	Page
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	<i>passim</i>
<i>Bell, In Re</i> , 110 Cal.App.3d 818, 168 Cal.Rptr. 100 (1980)	23
<i>Benjamin v. Malcolm</i> , 495 F.Supp. 1357 (S.D.N.Y. 1980)	19, 20
<i>Boudin v. Thomas</i> , 533 F.Supp. 786 (S.D.N.Y. 1982)	19, 21, 28, 30, 31
<i>Campbell v. Cauthron</i> , 623 F.2d 503 (8th Cir. 1980)	19, 22
<i>Campbell v. McGruder</i> , 554 F.Supp. 562 (D.C.D.C. 1982)	19
<i>Cleveland Board of Education v. La Fleur</i> , 414 U.S. 632 (1974)	27, 29
<i>Cooper v. Morin</i> , 49 N.Y.2d 69, 399 N.E.2d 1188 (1979)	28, 29
<i>Dawson v. Kendrick</i> , 527 F.Supp. 1252 (S.D.W.Va. 1981)	19
<i>Delancie v. Superior Court</i> , 31 Cal.3d 865, 183 Cal.Rptr. 866, 647 P.2d 142	11, 15
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	26
<i>Fischer v. Winter</i> , 564 F.Supp. 281 (N.D. Cal. 1983)	19
<i>French, In Re</i> , 106 Cal.App.3d 74, 164 Cal.Rptr. 800 (1980)	23
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965) ...	17, 26, 27
<i>Hudson v. Palmer</i> , 82-1630, ruling below, 697 F.2d 1220 (4th Cir. 1982)	34
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978)	22, 25
<i>Jones v. Diamond</i> , 636 F.2d 1364 (5th Cir. 1981)	19, 20, 22
<i>Jones v. Wittenberg</i> , 509 F.Supp. 653 (N.D. Ohio 1980)	24
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963)	19, 23
<i>Kincaid v. Rusk</i> , 670 F.2d 737 (7th Cir. 1982)	32
<i>Lareau v. Manson</i> , 651 F.2d 96 (2nd Cir. 1981)	19, 20, 22
<i>Lock v. Jenkins</i> , 641 F.2d 488 (7th Cir. 1981)	19, 22
<i>Logan v. Shealy</i> , 660 F.2d 1007 (4th Cir. 1981)	19, 32
<i>Malone v. Colyer</i> , 710 F.2d 258 (6th Cir. 1983)	19

Table of Authorities Continued

	Page
<i>Martino v. Carey</i> , 563 F.Supp. 984 (D. Ore. 1983) ...	19
<i>McGoff v. Rapone</i> , 78 F.R.D. 8 (ED Pa. 1978)	24
<i>McMurry v. Phelps</i> , 533 F.Supp. 742 (W.D. La. 1982)	19, 20
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	26, 27
<i>Moore v. City of East Cleveland, Ohio</i> , 431 U.S. 494 (1977)	17, 27, 28, 29
<i>Parnell v. Waldrep</i> , 511 F.Supp. 764 (W.D.N.C. 1981)	32
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	18, 34
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	27
<i>Procurier v. Martinez</i> , 416 U.S. 396 (1974)	17, 32, 33
<i>Rhem v. Malcolm</i> , 371 F.Supp. 594 (S.D.N.Y. 1974) .	21
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	20, 25
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	26
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	27
<i>Smith v. Organization of Foster Families</i> , 431 U.S. 816 (1977)	28
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	26, 27
<i>Studiengesellschaft Kohle v. Eastman Kodak Co.</i> , 616 F.2d 1315 (5th Cir. 1980), cert. den. 449 U.S. 1014 (1980)	5
<i>U.S. ex rel. Wolfish v. Levi</i> , 439 F.Supp. 114 (S.D.N.Y. 1977)	25
<i>Vazquez v. Gray</i> , 523 F.Supp. 1359 (S.D.N.Y. 1981) ..	19
<i>Villanueva v. George</i> , 659 F.2d 851 (8th Cir. 1981) ...	19
<i>Wesson v. Johnson</i> , 579 P.2d 1165 (Colo. S.Ct. 1978) .	28
<i>Wolfish v. Levi</i> , 573 F.2d 118 (2nd Cir. 1978)	26, 28
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978)	27, 28, 29

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourteenth Amendment, Sec. 1	<i>passim</i>
--	---------------

Table of Authorities Continued

	Page
STATUTES AND RULES:	
California Penal Code, § 2600	1, 10
California Penal Code, § 2601	1, 10
15 Cal. Admin. Code § 3170(d)	1, 11
15 Cal. Admin. Code § 3287(a)(3)	2
Rule 52(a), Fed. R. Civ. Pr.	5
OTHER AUTHORITIES:	
McGowan & Blumenthal, WHY PUNISH THE CHILDREN: A STUDY OF CHILDREN OF WOMEN PRISONERS	29
Schwartz & Weintraub, THE PRISONERS WIFE: A STUDY IN CRISIS, 38 Fed. Prob. No. 4	29
Zemans & Cavan, MARITAL RELATIONSHIPS OF PRISONERS, 49 J. Crim. L. & Criminology 50 ...	29
Simpson, CONJUGAL VISITING IN UNITED STATES PRISONS, 10 Col. Human Rights L. Rev. 643	29
Note, ON PRISONS AND PARENTING: PRESERVING THE TIES, 87 Yale L.J. 1408	29
Karten, MOTHERS BEHIND BARS—WHAT HAPPENS TO THEIR CHILDREN	29
McCandles, CHILDREN BEHAVIOR AND DEVELOPMENT, 162-68 (2nd Ed. 1967)	30
Lamb, FATHER-INFANT AND MOTHER-INFANT INTERACTION IN THE FIRST YEAR OF LIFE, 348 Child Development 167 (1977)	30, 31
Bowlby, 1 ATTACHMENT AND LOSS, 255 (1969) ..	30
Ainsworth, INDIVIDUAL DIFFERENCES IN SOME ATTACHMENT BEHAVIORS, 18 Merrill-Palmer Quarterly 123 (1972)	30
Lamb, FATHERS: FORGOTTEN CONTRIBUTORS TO CHILD DEVELOPMENT, 18 Human Development 243 (1975)	31

Table of Authorities Continued

	Page
Mussen, Conger and Kagan, CHILD PERSONALITY AND DEVELOPMENT, 154 (1974)	31
Ribble, INFANTILE EXPERIENCES IN RELATION TO PERSONALITY DEVELOPMENT (Hunter 1944)	31
Huss, TOUCH WITH CARE OR A CARING TOUCH, 31 Amer.J. of Occ. Ther. 11 (1977)	31

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (PA 1) is now reported at 710 F.2d 572 (9th Cir. 1983). All other opinions below are correctly cited in Petitioners' brief at 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to those contained in Petitioners' brief at 1, the following statutory provisions are involved in this case:

California Penal Code

§ 2600. Deprivation of rights relating to security of institution and protection of public.

A person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public.

§ 2601. Retention of Rights.

Notwithstanding any other provisions of law, each such person shall have the following civil rights:

* * *

(d) To have personal visits; provided that the department may provide such restrictions as are necessary for the reasonable security of the institution.

California Administrative Code, Title 15

§ 3170. General Visiting Policy.

* * *

(d) Devices which do not allow physical contact between inmates and visitors will not be used except as is necessary in individual instances where substantial reasons exist to believe that physical contact with a visitor, visitors or with other inmates will seriously endanger the safety of persons or the

security of the institution, or as a temporary measure as punishment for willful failure or refusal to abide by regulations related to visiting.

§ 3287. Cell, Property and Body Inspections.

(a) . . . * * *

(3) An inmate's presence is not required during routine inspections of living quarters and property when the inmate is or would not otherwise be present. During special inspections or searches initiated because the inmate is suspected of having a specific item or items of contraband in his or her quarters or property, the inmate should be permitted to observe the search when it is reasonably possible and safe to do so.

STATEMENT OF THE CASE

1. Procedural History

We adopt the procedural history set forth in Petitioners' opening brief with the following clarifications and additions.

This class action was certified as containing two subclasses, the first consisting of pretrial detainees and the second consisting of sentenced prisoners (J.A. 51). On the eve of trial, detainees comprised approximately sixty-five percent of the Jail's population (J.A. 59), and during the course of trial that percentage increased significantly in accordance with the Sheriff's plan to phase out sentenced prisoners (R.T. 13:3241, 21:4462, 4536).

The district court proceeded quite cautiously in this matter, providing defendants with every opportunity to convince the court that injunctive relief was unnecessary, inappropriate, or inequitable. After a 17-day trial, two inspections of the Jail, and extensive briefing by both sides (P.A. 42), the court issued a Memorandum Decision (P.A. 41), containing its tentative determinations, identifying ten substantive areas ostensibly requiring injunctive relief—crowding, visitation, outdoor recreation, indoor recreation, windows, processing for court, telephones, cell searches, time for meals, and clothing—

inviting further explanation from the defendants as to why an injunction should not issue.

In response to defendants' motion for reconsideration the court held four days of post-trial hearings (J.A. 3; P.A. 29), at which defendants presented evidence to convince the court to abandon its tentative conclusions on four specific issues—contact visitation, restoration of windows, cell search procedures, and obstructions on one of the Jail's rooftop recreation areas. The district court took the matter under submission and eventually issued its Supplemental Memorandum Decision (P.A. 29), in which the court reversed itself on the constitutional necessity for removing obstructions on the roof recreation area, modified its ruling on contact visitation by further restricting eligibility to low-risk detainees incarcerated 30 days or longer (as compared to 40 days or longer in its original Memorandum of Decision), adopted a method of searching cells developed and demonstrated by defendants, and reaffirmed its earlier conclusion that existing window openings must be uncovered. After yet further argument, the court issued its initial judgment on February 15, 1979 (P.A. 37).¹

¹ The judgment contains twelve injunctive provisions, nine of which defendants have accepted, to wit, enjoining defendants to provide every prisoner with a bed, to allow visits by unescorted minor children, to permit outdoor recreation, to install television sets, to provide all detainees going to court with seating in Jail holding cells, to wake up detainees going to trial not earlier than 6 a.m. and return such detainees to their cells not later than 8 p.m., to install telephones, to afford inmates not less than fifteen minutes to eat their meals, and to provide prisoners with a change of clothing at least twice a week.

The district court declined to issue orders as to other conditions which, although deleterious, did not in the court's view rise to the constitutional deprivation which called for court intervention. For example, it denied injunctive relief against overcrowding even though defendants allowed less than 25 feet of floor space per man, an amount far less than the 40 square feet prescribed by California

2. Statement Of Facts

The two challenged orders must be considered in the context of certain pervasive facts. First, the deprivations challenged in this action are suffered by detainees for extensive periods of time. Although there is rapid turnover of short-term prisoners, a very substantial percentage of the Jail's pretrial population is a relatively stable group which spends months in the Jail pending resolution of criminal charges. This fact was revealed by the testimony of Lt. Thomas Lonergan, a key witness from the Sheriff's Department, who testified that: very conservatively 75% of the Jail's pretrial detainees are accused of felonies (R.T. 21:4463)²; three to four months are required to process felony charges in Los Angeles County courts (R.T. 21:4537); on October 24, 1978, the Jail held 2,864 pretrial detainees who had been in custody more than 15 days (R.T. 21:4465); and in the universe of pretrial detainees both booked

Minimum Jail Standards and a number of cases (P.A. 45-47) and the generally accepted minimum standard of 50 square feet (P.A. 46). The Court also refused to enjoin a practice whereby, under certain circumstances, detainees were required to sleep on the floor for one night. (P.A. 37-38). It permitted an outdoor recreation schedule of only 2½ hours per week, conceding that this is considerably less than what several other courts have required. (P.A. 50-51). It declined to require the dismantling of a structural obstruction on the rooftop recreation area which severely interfered with recreation (P.A. 52). It refused greater access to law library facilities (P.A. 63). It denied brutality claims (P.A. 64). Even as to violations of the order the court had made, it required the inmates to exhaust an administrative procedure before it would entertain any application for contempt (P.A. 40-41).

² Due to idiosyncrasies of the Jail's computer system, a detainee accused of both a felony and a misdemeanor might be reflected as a misdemeanant if he is next scheduled to appear in court on the misdemeanor (R.T. 21:4463).

and released during 1977, 1,290 were held more than 180 days and 4,798 were held between 61 and 180 days (R.T. 21:4466-7).³

Second, the Central Jail is the most populous penal facility in the country. Its rated capacity, 5,548 (J.A. 59), is larger than that of any other correctional institution⁴ and almost twice that of the next largest jail (R.T. 20:4194).⁵

A. Contact Visits

On the question of contact visitation, the relevant findings of the district court,⁶ contained in its Memorandum Decision (P.A. 41), Supplemental Memorandum Decision (P.A. 29) and Memorandum Decision (after remand) (P.A. 23) are as follows:

1. The ability to embrace wives and children "is a matter of great importance" to pretrial detainees confined for long periods of time (P.A. 48, P.A. 32-33); and the deprivation of contact visits to such detainees is "very traumatic treatment" (P.A. 25);

³ Obviously, these last two statistics minimize the number of persons experiencing lengthy confinement since they do not include persons booked before 1977 who were released in 1977 or a later year (R.T. 21:4534) and the chances of being omitted from defendants' data for 1977 increase with the length of confinement. For example, plaintiffs Rutherford, Taylor and Armstrong were pretrial detainees for 39 months, 33 months and 15 months, respectively (J.A. 53).

⁴ The second most populous correctional institution, Jackson State Prison in Michigan with a rated capacity of 5,000 occupies a much larger area than the Jail (R.T. 20:4194-5).

⁵ The Cook County, Illinois jail has a rated capacity of 2,800; and the largest jail in New York City has a rated capacity of 2,300 (R.T. 20:4194).

⁶ Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness. Rule 52(a), Federal Rules of Civil Procedure; *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 616 F.2d 1315 (5th Cir. 1980), *cert.den.*, 449 U.S. 1014 (1980).

2. Defendants' "categorical rejection of all proposals involving any such visits" is an "overreaction" stemming from "an unreasonable fixation upon security" (P.A. 25-26);

3. Problems posed by contact visits are rendered manageable by limiting the number and frequency of such visits and by limiting eligibility for such visits to low security risk prisoners (P.A. 26; P.A. 33);

4. Defendants are able to conduct and have implemented a classification system to evaluate pretrial detainees regarding their propensities for escape and drug abuse (P.A. 48);

5. A substantial number of pretrial detainees receive low risk classifications from defendants (P.A. 48);

6. Defendants have a great deal of information about pretrial detainees incarcerated one month or more derived from their classification system, investigation, and opportunity to observe (P.A. 33);

7. Danger to jail security posed by according contact visits to low-risk pretrial detainees is insufficient to justify depriving them of all physical contact with their loved ones for extensive periods of time. (P.A. 32, 48);

8. Defendants have the means, such as supervision during visitation and strip searches after visitation, to maintain jail security during contact visitation (P.A. 48, 49); and

9. Massive construction is not necessary to accommodate physical contact visitation limited to non-high security detainees held one month or more and to a maximum of 1,500 visits per week (P.A. 33).

Evidence in the record amply sustains these findings. The eight corrections experts who testified for both plaintiffs and defendants on this issue took varying approaches; but at the bottom line the testimony of each reveals that the benefits of contact visitation considerably outweigh the risks and that it is more than feasible in this particular facility.

On the question of the importance of contact visitation to prisoners' spiritual and emotional health, William Nagel, a distinguished corrections expert from Philadelphia, testified that contact visitation was highly beneficial to both prisoners and institutions by engendering some sense of normalcy, facilitating family relationships and generally reducing tensions (R.T. 21:4174-6). In his words, visitation is "the most important single experience" in an inmate's prison life and is the time when he acts "in his highest humanness" (R.T. 21:4168).

Elaborating on this theme, Dr. Terry Kupers, a psychiatrist, testified that contact visitation is crucial for the maintenance of prisoners' mental health, decreasing their anxiety and disorientation (R.T. 22:4647-9). Although the absence of contact visitation may not, in itself, cause mental illness, the frustration and alienation inherent in barrier visitation is clearly detrimental to mental health and may be a contributing factor in a prisoners' mental breakdown (R.T. 22:46, 47, 49-50). The stress caused by the absence of physical touching during visits increases with the length of incarceration (R.T. 22:4663-4). The lack of contact visitation is a significant factor in causing the break-up of marriages (R.T. 22:4651). Dr. Kupers based his testimony on clinical interviews of ex-prisoners, including those who have been in the Central Jail and his knowledge of literature on social deprivation (R.T. 22:4647-8). He also indicated that a California Department of Health Task Force, including the Los Angeles County Jail's Chief Physician, Dr. Armon Toomajian, was unanimous that prisoners should be allowed physical contact visitation (R.T. 22:4648).⁷

⁷ Defendants' medical expert, Los Angeles County Jail psychiatrist Donald Verin conceded upon examination by the court that the therapeutic value to a detainee of being able to kiss his wife and fondle his children "can be important," and opposed contact visiting primarily upon his analysis of security concerns which were outside the scope of his expertise. R.T. 21:4507.

Defendants' expert George Sumner, the Warden of San Quentin Prison, conceded the need for contact visitation in testifying that visitation is "very necessary," that it encourages proper inmate behavior and that it assists inmates' reintegration into society (R.T. 22:4624).

Expert testimony at trial further reflects the punitive nature of denying contact visitation. Mr. Nagel testified that even in prisons the denial of contact visitation is rare (R.T. 20:4160), a fact confirmed by San Quentin Warden George Sumner (R.T. 22:4600, 4632-3), and by Lloyd Patterson, the former superintendent of Deuel Vocational Institute (DVI) (R.T. 22:4571-3). More importantly, Mr. Nagel testified that in most prison inmates are assumed capable of handling contact visitation. It is only when a particular prisoner violates the visiting space itself that contact visitation privileges are withdrawn as a form of punishment (R.T. 20:4160).

Mr. Patterson and Mr. Sumner similarly testified that withdrawal of contact visitation was a potent disciplinary measure within their respective prisons because prisoners exercised self-control in order to preserve their prized visitation privileges (R.T. 22:4588-9, 4624).

An abundance of evidence in the record establishes that a contact visitation program can be conducted without jeopardizing institutional security. Expert testimony revealed the existence of a variety of adequate and tested security precautions, available to the defendants to provide for contact visitation, including: creation of a secure area serviced by two sally ports, one for use by prisoners and one for use by visitors; searches of prisoners before and after visits; dressing of prisoners in separate garments for visits; metal detectors and flourosopes used on prisoners and visitors; rejection or storage of visitors' parcels; rejection of visitors who refuse to comply with security procedures; searches of visitors who refuse to comply with security procedures; observation of the visiting area by officers; and classification of prisoners. (Nagel, R.T. 20:4164-6, 4232; Patterson, R.T. 22:4575-7, 4854-5; Sum-

ner, R.T. 22:4601; Pierce, R.T. 5:1980-2, 1989-90). Mr. Nagel testified that the use of these security devices "will prevent everything except the most extreme methods of introducing drugs into the institution" (R.T. 20:4170). Mr. Patterson indicated that during his 11 years at DVI, his staff did not discern one weapon being smuggled into the institution through the visiting area (R.T. 22:4587-8), and only three or four incidents occurred in that area (R.T. 22:4589). And Arnett Gaston, Warden of New York City's Men's House of Detention, testified that significant physical confrontations such as those which defendants predicted would flow from contact visitation have largely been absent from his facility (R.T. 20:4368).

The record demonstrates that some influx of narcotics is endemic to penal facilities and that defendants overstate the contraband problem posed by contact visitation. Mr. Nagel stated that in his opinion, based on 11 years' experience in the New Jersey prison system (R.T. 20:4154) and his visits to more than 350 penal institutions (R.T. 20:4157-8), misconduct during contact visitation was unusual due to the importance of such visitation to prisoners (R.T. 20:4168). Although narcotics may be brought into an institution through contact visitation, there are other, more significant sources of contraband, including commerce with the institution, smuggling by employees (R.T. 20:4172-3) and "drops" picked up by trustees working outside of the institution (R.T. 20:4177-8). Correctional administrators often express concern regarding the passage of narcotics in balloons during visitation, yet the frequency of the use of such method is unknown (R.T. 20:4251). Mr. Patterson and Mr. Sumner similarly testified that contraband enters their facilities through a variety of means other than contact visitation and would continue to enter without such visitation (R.T. 22:4589-90, 4624-5). In this regard, defendants, themselves, admit that the Jail currently has a contraband problem although they prohibit personal contact visitation (see, e.g., R.T. 13:3307, 21:4526-7).

Further, the evidence shows that contact visitation is the norm in facilities for convicted prisoners and is expanding

rapidly within local detention facilities. Mr. Nagel testified that contact visitation is "(t)he prevailing practice" for convicted offenders and that there is "considerable movement" toward contact visitation in jails (R.T. 20:4158). Mr. Nagel further testified that professional standards established by the National Sheriff's Association and the American Correctional Association called for contact visitation in jails (R.T. 20:4189). Mr. Nagel also pointed out an irony in the current disparity between visitation practices in prisons and jails: prisons uniformly allow contact visitation to the vast majority of their inmates, yet such inmates have far greater incentive to import contraband into their facilities and have much greater time to scheme to effect such importation (R.T. 20:4159-60, 4173).

In the aggregate, the testimony of Messrs. Patterson, Sumner and Pierce establishes beyond question that in the California prison system contact visitation is the rule. Mr. Patterson testified that at DVI, a facility housing the California prisons system's most difficult inmates—younger offenders accused of violent and aggravated offenses (R.T. 22:4571)—the only screening⁸ with regard to contact visitation is a short review done by a captain the day of each prisoner's arrival and thereafter 75% of the new prisoners are immediately permitted contact visitation (R.T. 22:4585).⁹ Mr. Patterson further testified that in the California prison system as a whole about 80% of the inmates are allowed contact visitation (R.T. 22:4587).¹⁰ Mr.

⁸ No classification as to contact visitation *per se* is done at the California prison system's reception centers prior to transfer to permanent facilities such as DVI (R.T. 22:4586).

⁹ Among the 25% denied contact visitation at DVI were protective custody prisoners, i.e., prisoners needing protection from their fellows, who did not receive such visitation because the wing in which they were housed was not constructed to permit it (R.T. 22:4581-2).

¹⁰ This practice apparently results from recent actions of the California Legislature. California Penal Code, Sections 2600 and 2601 state generally that prisoners serving a state prison sentence retain

Sumner testified that about 84% of San Quentin's population (R.T. 22:4600, 4632-3) is allowed contact visitation within one week of arrival (R.T. 22:4632). William Pierce testified that at the California Department of Corrections Southern Reception Center, an entry point for new commitments to the state prison system, within 7 to 10 days of their arrival many inmates are assigned to Reception Center West, a temporary holding facility, and are thereafter allowed contact visitation (R.T. 5:1980-2, 1989-90).

Similarly, the testimony of Walter Lumpkin, the warden of the Federal Metropolitan Correctional Center in San Diego (Deposition [in evidence] 7-8, 14-16), and Lt. Bobby Creek of the Federal Correctional Institution at Terminal Island (R.T. 5:1955) reveals that it is the policy of the Federal Bureau of Prisons to allow contact visitation to pretrial detainees and convicts, alike.

In New York City, according to Mr. Gaston, the Department of Corrections has voluntarily expanded contact visitation to all of its facilities and from one to three hours each week for each prisoner (R.T. 20:4362-3).

certain civil rights including the right "to have personal visits." Pursuant to state law, the California Director of Corrections has promulgated regulations which are codified in California Administrative Code, Title 15, and Section 3170(d) of the Code expressly prohibits "Devices which do not allow physical contact between inmates and visitors . . ." except in certain circumstances. Most recently, the California Supreme Court held that the above sections of the Penal Code "apply . . . not only to state prisoners but also to those merely detained pending trial" and that "these provisions . . . are equally binding upon county jail authorities." (footnote omitted). *DeLancie v. Superior Court, etc.*, 31 Cal.3d 865, 872, 183 Cal.Rptr. 866, 870, 647 P.2d 142 (1982). Although the *DeLancie* court noted the relevance of the California Administrative Code to their inquiry, *id.*, 31 Cal.3d at 874, 183 Cal.Rptr. at 872, the question of its binding application to detainees is apparently open.

Finally, the district court had before it expert opinion that contact visitation is specifically feasible at the Central jail. Mr. Nagel testified that contact visitation would be possible with the use of security procedures described earlier in his testimony (R.T. 20:4164-6) and with some structural alterations, namely the creation of a separate visitation building that could be constructed on top of the adjacent parking structure (R.T. 20:4186-7). Likewise, Mr. Patterson opined that contact visitation could be safely allowed at the Central Jail. He suggested that a secure visitation area could be created with minor structural modifications in the current visiting lobby (R.T. 22:4595) and that that "a large percentage" of the Jail's detainees could be readily cleared for contact visitation by using Criminal Identification Investigation rap sheets, police reports and interview, always resolving any doubt by denying contact visitation—at least until further information is received (R.T. 22:4593-4).

The testimony of the Sheriff's Department's own in-house correctional expert, Lt. Lonergan (R.T. 16:3746), supports the view that only the availability of an appropriate facility stands in the way of contact visitation. Although Lt. Lonergan testified that there are two principal obstacles to such visitation, namely the lack of a facility and a speedier prisoner identification system (R.T. 21:4531-2), his earlier statement that 70% of the Jail's detainees are identified in three weeks (21:4450-51)¹¹ and his admission that defendants have the know-how to conduct a psychological profile (R.T. 21:4532) belie the significance of classification as a problem.

¹¹ The apparent contradiction between Lt. Lonergan's statements that 70% of the detainee population is identified within three weeks, and his mention of the need for faster classification may in part be explained by the fact that at the time of his testimony the district court's original Memorandum Decision indicated that detainees held two weeks or more should receive contact visitation. (P.A. 49).

The district court, after careful consideration of the full record, held that

[I]f a man is incarcerated in the jail for more than a few weeks, principles of basic human decency require that all reasonable attempts be made to permit him to kiss his wife or his girlfriend and to hug his child once in a while during this long, difficult and inherently depressing period in his life.

(P.A. 32). The court accordingly entered a limited order affording one contact visit per week, but only to those detainees who had been classified as low-risk, and only to those low-risk detainees who had been in the jail a month or longer. The court also (i) limited the number of contact visits at the jail to 1,500 per week, (ii) allowed defendants to provide less than one contact visit per week to eligible prisoners if doing so would require defendants to exceed the 1,500 per week limit, and (iii) left the length of each contact visit in the total discretion of the Sheriff (P.A. 38).

On appeal, the Ninth Circuit expressly affirmed the district court's findings as to "the adverse psychological effects caused by the lack of physical contact with family members over a prolonged period of time." (P.A. 5), 710 F.2d at 575. The Court of Appeals agreed with Judge Gray that the denial of all physical contact with loved ones is "an unreasonable and exaggerated response by the county for those detainees who spend more than thirty days in the facility and who can be identified as low-risk detainees." (P.A. 5-6), 710 F.2d at 575-76. While readily agreeing with the defendants that "contact visitation is not constitutionally mandated for all detainees in all facilities," (P.A. 8), 710 F.2d at 577, the Court of Appeals recognized "the psychological and punitive effects which the prolonged loss of contact visitation has upon detainees, who have not yet been convicted of any crime," *id.*, and concluded that "[a] blanket restriction on contact visits for all detainees may present an unreasonable, exaggerated response to security concerns at a particular facility." *Id.* (emphasis added). Accordingly, the district court's narrow and carefully limited contact visitation order was unanimously affirmed.

B. Observation Of Cell Searches

On the question of exclusion of pretrial detainees from the area of their cells during searches, the district court's findings are as follows:

1. Permitting pretrial detainees to observe searches of their cells would provide them with their only opportunity to explain, protest or entreat against arbitrary confiscation of their meager but cherished possessions under subjectively enforced regulation (P.A. 61; P.A. 36; P.A. 38);

2. A cell search method designed by petitioner known as Method C, which permits pretrial detainees present to observe searches of their cells is an efficacious means of conducting such searches while protecting prisoners' interest in their property (P.A. 36; P.A. 27).

This order is supported by an abundance of testimony by both prisoners and deputy sheriffs indicating that the speed with which prisoners' cells are searched invariably leads to significant disruption, confiscation and/or destruction of property. Inmates variously testified that during so-called "shake-downs" their cells are "completely destroyed," "like you would take a giant beater and go into the cells and just stir it up" (R.T. 6:2236), "[a]ll your personal property was thrown all over the floor, scattered all around" (R.T. 7:2388), and everything was left "in a pile in the center of the cell" (R.T. 5:2022). On the other hand, deputies who testified acknowledged that they were forced to rapidly search cell-rows, each containing 13 four or six man cells (J.A. 68, 72), and did not have the opportunity to be neat (see, R.T. 1:1116, 3:1632, 4:1967, 10:2861-3, 10:2871, 11:2909, 11:2948-9, 11:3021, 3031).¹²

¹² The testimony of Jail officers was highlighted by the candor of Deputy Sheriff Rollie McEntire, who indicated that his nickname in the Jail was "The White Tornado" because in searching prisoners' cells he would leave property "a little messy" (R.T. 11:2948-9).

The order is also based on the court's direct observation of various cell search procedures demonstrated by petitioners and most specifically its observation of the interaction between a prisoner permitted to observe the search of his cell and searching deputies (P.A. 36). The Court's "significant generalization" derived from its view (P.A. 25), that the presence of prisoners was an effective way of ameliorating deprivations of property occurring during searches is sustained by prisoner testimony at the original trial and by expert testimony.

Mr. Nagel testified that it is desirable to conduct cell searches in the presence of inmates so that prisoners' suspicions that they are being deprived of their meager possessions without due process of law will be allayed (R.T. 20:4201-2). He stated that such a procedure is feasible (R.T. 20:4202), and that denying inmates the opportunity to observe searches of their cells when possible "adds to the whole atmosphere of suspicion in the institution" (R.T. 20:4201).

Petitioners opposed judicial imposition of "Method C" with conjecture over security concerns, especially that an officer conducting searches on a top tier could fall to the tier below, and that prisoners preferred not to observe searches of their cells (R.T. 19:4132-3), but presented no convincing evidence that these or other evils would actually occur.¹³

In light of this evidence, and the fact that petitioners themselves voluntarily designed the search procedure eventually

¹³ Mr. Sumner's brief testimony regarding the difficulties of allowing prisoners to observe cell searches was based solely upon his experiences in the high security unit at San Quentin (R.T. 22:4633). Furthermore, a recently promulgated California Department of Corrections regulation, codified at 15 Cal. Admin. Code § 3287(a)(3), demonstrates that Mr. Sumner's employer endorses such prisoner observation. And the application of that regulation to detainees is apparently an open question under state law. See, *DeLancie v. Superior Court, etc.*, *supra* and n.10, *supra*.

ordered (R.T. 19:4115-6), the court concluded that detainees' interests in fair treatment regarding their possessions demanded protection and could reasonably be accommodated through their presence without jeopardizing Jail security.

SUMMARY OF ARGUMENT

In this case, officials of Los Angeles County ask the Court to review two narrowly drawn orders of the trial court, both of which were affirmed by the Court of Appeals.

I. Contact Visits

The trial court entered a limited order affording one contact visit per week, but only to those detainees who had been classified as low-risk, and only to those low-risk detainees who had been in the jail a month or longer. The court also limited the total number of contact visits at the jail each week and left the length of each visit to the total discretion of the Sheriff.

The lower courts carefully followed the teaching of *Bell v. Wolfish*, 441 U.S. 520 (1979), and determined that the total prohibition of contact visits constituted impermissible punishment in violation of the Due Process Clause. The trial court, after noting the different overall conditions in this older, overcrowded jail as compared to the new facility in *Wolfish*, found that the total prohibition of contact visits constituted genuine privations and hardship over extended periods of time and was an exaggerated, punitive response by the jail officials which required judicial relief. In the light of the specific findings by the trial court that the officials' actions were excessive in relation to the alternative purpose assigned and resulted in punishment, combined with the other aggravating conditions at this Jail, the challenged order is a minimal intrusion carefully selected and designed to alleviate the excessive deprivations suffered by these detainees.

In addition, the trial court found that the total prohibition of contact visitation seriously impeded the familial rights of detainees and their visitors causing trauma and pain. In *Wolfish*

the Court specifically noted that it was not dealing with fundamental liberty interests established by a long line of cases. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965). This case does deal with the very fundamental interests alluded to in *Wolfish*, 441 U.S. at 534-35, and must be accorded "shelter under the Fourteenth Amendment's Due Process Clause," *Moore v. City of East Cleveland*, 431 U.S. 494, 500-01 (1977).

The Court in *Wolfish* noted that where other constitutional rights, such as those under the First Amendment, were implicated, the analysis must go beyond merely looking for punishment. *Wolfish* at 549-53. Because there are fundamental familial rights involved in this case, the Court is required to entertain a more careful scrutiny of the balance between the interests involved. *Procunier v. Martinez*, 416 U.S. 396 (1974). Thus, the complete elimination of all opportunity for all detainees to touch their loved ones, especially infant children, is obviously "greater than is necessary or essential to the protection of the governmental interest involved." *Procunier* at 413.

II. Observation Of Cell Searches.

The trial court's order required that detainees present in the vicinity of their cellblock be given the opportunity to observe searches of their cells and property, a method chosen especially by the jail officials as one of a number of alternative plans. The petitioners rely solely on this Court's holding in *Wolfish* that the right to observe searches of their cells does not violate an inmate's rights under the Fourth Amendment.

The holding in *Wolfish*, however, is not dispositive of that issue in this case because it is clear that the trial court was concerned that detainees not be deprived of their property without due process of law. This Court in *Wolfish* never considered the cell search issue in the context of infringing on a detainee's due process rights and, in the light of the limited order in this case, the limited holding of *Wolfish* is inapposite.

Moreover, in *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court, after *Wolfish*, indicated that due process guarantees apply to the taking or destruction of a prisoner's property and that a hearing is required before the state deprives a prisoner of his property interests. In this case, the trial court did not enjoin the officials' cell search procedure as unconstitutional *per se* but rather as being actually conducted in a manner abusive to detainees' property rights and the limited holding of *Wolfish* does not control the resolution of the precise issues at bar.

ARGUMENT

I. TOTAL PROHIBITION OF CONTACT VISITATION AT THE LOS ANGELES COUNTY JAIL CONSTITUTES IMPERMISSIBLE PUNISHMENT OF UNCONVICTED PRETRIAL DETAINEES IN VIOLATION OF THEIR RIGHTS UNDER THE DUE PROCESS CLAUSE.

A. The Due Process Clause Prohibits Punishment Of Pre-trial Detainees.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court held that unconvicted pretrial detainees may not be subjected to punishment or to conditions of confinement which amount to punishment:

In evaluating the constitutionality of conditions or restrictions of pretrial detention . . . we think that the proper inquiry is whether those conditions *amount to punishment* of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. . . . [T]he Government . . . may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility *so long as those conditions and restrictions do not amount to punishment*. . .

Id. at 535-37 (emphasis added). The Court further declared that detainees need not prove an express intent to punish in order to prevail under this standard. Even if a non-punitive purpose is the cause of a particular restriction, it may constitute punishment if it "appears excessive in relation to the

alternative purpose assigned [to it]." *Id.* at 538, quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963). If a detainee can prove that a particular restriction is in fact an "exaggerated response" to the legitimate needs of jail officials, that restriction is unconstitutionally excessive and therefore amounts to punishment in violation of the Due Process Clause. *Id.* at 541 n.23, 548 and 562.

Although the Court in *Wolfish* did not apply this standard to invalidate any of the practices at issue in that case,¹⁴ numerous federal courts have utilized the standard since *Wolfish* to remedy a variety of unconstitutional jail conditions. See, e.g., *Malone v. Colyer*, 710 F.2d 258 (6th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Villanueva v. George*, 659 F.2d 851 (8th Cir. 1981) (en banc); *Lareau v. Manson*, 651 F.2d 96 (2nd Cir. 1981), *modifying and affirming*, 507 F.Supp. 1177 (D. Conn. 1980); *Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (en banc); *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980); *Fischer v. Winter*, 564 F.Supp. 281 (N.D. Cal. 1983); *Martino v. Carey*, 563 F.Supp. 984 (D. Ore. 1983); *Campbell v. McGruder*, 554 F.Supp. 562 (D.C.D.C. 1982); *Boudin v. Thomas*, 533 F.Supp. 786 (S.D.N.Y. 1982); *McMurry v. Phelps*, 533 F.Supp. 742 (W.D. La. 1982); *Dawson v. Kendrick*, 527 F.Supp. 1252 (S.D. W.Va. 1981); *Vazquez v. Gray*, 523 F.Supp. 1359 (S.D.N.Y. 1981); *Benjamin v. Malcolm*, 495 F.Supp. 1357 (S.D.N.Y. 1980). As the Seventh Circuit declared in *Lock v. Jenkins*, *supra*, 641 F.2d at 498:

We do not read anything in *Wolfish* as requiring this court to grant automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline.

This sensitivity has been especially acute in cases involving jails which, unlike the one at issue in *Wolfish*, are traditional

¹⁴ The specific issue in the instant case—contact visitation—was not before the Court in *Wolfish*. The Court expressly stated that it intimated no view with respect to that issue. *Id.* at 560 n.40.

jails of traditional design. The facility in *Wolfish* was unique in that it "differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates." 441 U.S. at 525; *id.* at 544 n.27. The institution in this case, on the other hand, is very much the "familiar image of a jail." Indeed, on original submission the district court held that

Both from the testimony at the trial and from my personal inspection of the cell rows . . . it is apparent to the court that the multiple occupancy cells in both the 'old' and new sections of the jail and the general atmosphere in which they are located present poor examples of the civilized standards and concepts of dignity, humanity and decency to which Mr. Justice Blackmun made reference in *Jackson v. Bishop*, *supra*. The cells are much like those in the Hall of Justice Jail, as I pointed out in *Dillard v. Pitchess*, 399 F.Supp. 1225, 1231 (C.D. Cal. 1975), a case in which the living conditions there were held to be intolerable.

(P.A. 46).¹⁵ In cases involving such jails, courts have been particularly careful to scrutinize detainees' claims that the conditions of their confinement amount to punishment under the *Wolfish* standard. See, e.g., *Lareau v. Manson*, *supra*, 651 F.2d at 103-04 (2nd Cir. 1981); *McMurry v. Phelps*, *supra*, 533 F.Supp. at 762 (W.D. La. 1982); *Benjamin v. Malcolm*, *supra*, 495 F.Supp. at 1364 (S.D.N.Y. 1980). As one member of the *Wolfish* majority recently stated in a related context:

[I]ncarceration is not an open door for unconstitutional cruelty or neglect. Against that kind of penal condition, the Constitution and the federal courts, it is to be hoped, together remain as an available bastion.

Rhodes v. Chapman, 452 U.S. 337, 369 (1981) (concurring opinion of Justice Blackmun).

¹⁵ The defendants did not appeal nine of the trial court's original injunctive provisions such as providing every prisoner with a bed. See n.1, *supra*.

B. Total Prohibition Of Contact Visitation For Detainees Of The Los Angeles County Jail And Their Families Would Be Psychologically Harmful, Punitive In Effect, And Constitutes An Exaggerated Response To Security Problems.

In *Wolfish*, this Court indicated that "genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amount to punishment. . . ." 441 U.S. at 542. The harsh psychological effects of barrier visits, which one leading case found to be "inhumane and cruel in fact," *Rhem v. Malcolm*, 371 F.Supp. 594, 626 (S.D.N.Y. 1974), *aff'd*, 507 F.2d 333, 338 (2nd Cir. 1974), raise precisely those questions of privation and hardship. See also, *Jones v. Diamond*, *supra*, 636 F.2d at 1377 (deprivation of detainees' rights "to personal contact with their family and loved ones, to touch and hold their children and spouses" is a "serious" deprivation).

The trial court found that the ability to embrace wives and children "is a matter of great importance" to pretrial detainees confined one month or more (P.A. 48) and that the deprivation of such visits is "very traumatic treatment" (P.A. 25). A number of experts at the trial testified to the importance, from a mental health point of view, of contact familial visits.¹⁶ And, in the instance of pre-verbal children, the denial of physical contact is tantamount to no visitation at all. *Boudin v. Thomas*, 533 F.Supp. 786, 793 (S.D.N.Y. 1982). Many mental health professionals assert that barrier visitation, by placing a loved one in extremely close proximity (i.e., only a few inches away), yet denying any physical contact, is extremely frustrating and tortuous to many prisoners. *Rhem v. Malcolm*, *supra*, 371 F.Supp. at 602-3.

Petitioners' across-the-board prohibition against contact visitation is an exaggerated, punitive response demanding judicial relief. It denies contact visitation without regard to

¹⁶ See statement of facts, *supra* at pp. 7-8.

differences between individual pretrial detainees. Although the average period of detention for persons booked into the Central Jail and held more than 24 hours is 10.9 days (R.T. 21:4456-7), on any given day fully 75% of the jail's population is facing three months or more of incarceration pending resolution of felony charges (R.T. 21:4463, 4537). Obviously, the deprivations suffered by detainees facing months in the jail are of an entirely different magnitude than that of short-term detainees. See Kupers, R.T. 22:4663-4. *Wolfish*, 441 U.S. at 544; *Hutto v. Finney*, 437 U.S. 678, 686-7 (1978); *Lock v. Jenkins*, *supra*, 641 F.2d at 494-495; *Campbell v. Cauthron*, *supra*, 623 F.2d 507; *Lareau v. Manson*, 651 F.2d 96, 105 (2nd Cir. 1981).

Similarly, petitioners ignore vast differences in prisoners' propensities to escape or use drugs in the jail, propensities which petitioners have the means of identifying (P.A. 48, P.A. 33; R.T. 22:4527-8, 4532, 4584-5, 4632, 3:1981). Defendants proceed on the unfounded assumption that all detainees threaten jail security and thereby abridge detainees' rights "to be considered individually to the extent security and space requirements permit." *Jones v. Diamond*, 636 F.2d 1364, 1374 (5th Cir. 1981) (en banc). As the Court in *Lock v. Jenkins*, *supra*, stated with regard to certain detainees, known as safekeepers, who were transferred to and sequestered within an Indiana State Prison for reasons as varied as being dangerous or being endangered:

The very fact that the prison officials have not undertaken a classification process regarding the safekeepers or otherwise discovered their needs or their reasons for being sent to the prison makes it impossible for the prison officials to know what restrictions on each safekeeper are necessary to preserve internal order and effectively manage the institution.

Id., 641 F.2d at 497.

In addition, denial of contact visitation has punitive overtones. In California state prisons, where approximately 80% of the population is permitted contact visitation (R.T. 22:4587),

withdrawal of visitation privileges is used as a "stick" to control behavior (R.T. 22:4589, 4624).¹⁷ As established in *Wolfish*, and *Kennedy v. Mendoza-Martinez*, *supra*, such punitive use of contact visitation privileges in the field of corrections is an important factor in determining whether petitioners are moved by an unacceptable intent to punish.

In the instant case, defendants have not made any showing that the level of deprivations suffered by the limited group of low-risk detainees who are the target of the district court's order—those held 30 days or longer—is necessary to any significant state interest. The detainees who benefit by the district court's order suffer injuries to their right of association and their well-being for an extended period of time, three months or more (R.T. 22:4463, 4537), and have no alternative means of obtaining the human warmth necessary to mental health and family lives (Kupers, R.T. 22:4647-51).

Further, the district court properly found that there are available to defendants effective security precautions, commonly used in correctional institutions, such as classification, construction of a specially secured visiting facility, searches of prisoners, metal detectors, fluoroscopes, inspection or exclusion of visitors' parcels, identification of visitors, searches of visitors and visual observance (R.T. 20:4164-6, 4232, 22:4575-7, 4584-5, 4601), which will provide adequate protection to the integrity of the facility.

Two important circumstances coalesce in this case to show that defendants' claimed security needs do not provide a sufficient justification for denying contact visits to detainees. First, the petitioners inadvertently acknowledge that such visits can be conducted safely. Lt. Lonergan testified that 70% of the jail's detainees are identified in three weeks (R.T. 21:4529-30), and, as noted above, that only a speedier identification system and the absence of appropriate physical facilities stand in the

¹⁷ See also, *In re French*, 106 Cal.App.3d 74, 164 Cal.Rptr. 800 (1980); and *In re Bell*, 110 Cal.App.3d 818, 168 Cal.Rptr. 100 (1980).

way of contact visitation at the Central Jail (R.T. 21:4531-2). In this regard, it is worth noting the findings of the court in *Jones v. Wittenberg*, 509 F.Supp. 653, 699 (N.D. Ohio 1980), that a court-ordered contact visitation program implemented within the Lucas County (Toledo), Ohio jail "has proved to be far more successful than many people had thought . . . in reducing the tension level of the inmate . . . [and in being] secure." See also, *McGoff v. Rapone*, 78 F.R.D. 8 (E.D. Pa. 1978) (contraband entered jail in only a tiny fraction of one per cent of all contact visits during a period of more than three years).

Second, it is undisputed that contact visitation is the norm in prisons and is a growing practice in detention facilities. To briefly highlight the evidence: contact visitation is enjoyed by about 80% of the inmates in California state prisons (R.T. 22:4587), all pretrial detainees in the Federal Bureau of Prisons (Lumpkin Depo. 7-8, 13-14, R.T. 5:1955), all except identifiably dangerous detainees in New York City Jails (R.T. 20:4339, 4362); nationwide, exclusion of convicts from contact visitation is very rare (R.T. 20:4159); and both the National Sheriffs' Association (R.T. 20:4189) and the American Correctional Association (R.T. 20:4191) have established standards requiring that pretrial detainees be permitted to have contact visits.¹⁸ In the face of this evidence, petitioners cannot seriously contend (Br., 20) that plaintiffs are attempting to impose the sort of "lowest common denominator" practice disapproved by *Wolfish*. Rather, this evidence of the overwhelming practice in the corrections field establishes petitioners' exaggerated response to security problems.

C. The District Court's Orders Must Be Assessed In The Context Of The Totality Of Conditions Extant At The Jail.

The orders challenged in this appeal must be examined in the context of the totality of the debilitating, oppressive conditions at the Central Jail.

¹⁸ In *Wolfish*, this Court noted that professional standards may be "instructive." 441 U.S. at 543, n.27.

As this Court noted in holding that various conditions in the Arkansas penal system constituted cruel and unusual punishment in violation of the Eighth Amendment, "The order is supported by the interdependence of the conditions producing the violation." *Hutto v. Finney*, 437 U.S. 678, 688 (1978). Accord, *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Consequently, this Court must consider the totality of circumstances at the Central Jail prior to the issuance of the trial court's order and must view the challenged conditions at issue in this appeal as part of a larger policy denying respondents their constitutional rights in violation of *Wolfish*.

An examination which takes into account the totality of conditions at Central Jail is consistent with the approach of this Court in *Wolfish*, which took notice of the totality of conditions prevalent at the Metropolitan Correctional Center (MCC), the federally-operated, short-term custodial facility which was the subject of that litigation. This Court found that the MCC "differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors or clanging steel," 441 U.S. at 525; and in distinguishing lower court cases where the failure to provide minimum space requirements was found to be a constitutional violation, this Court noted the "factual disparity" between those "traditional jails and cells in which inmates were locked during most of the day" and the MCC facility, 441 U.S. at 543, n.27. As noted by the *Wolfish* trial court, the MCC facility was "markedly divergent from the bestial traditions of the American jail," containing carpeted common areas with color television sets, couches, chairs, tables, telephones, mail boxes, exercise equipment, typewriters, laundry facilities, water fountains, education areas and pantries with microwave ovens." *U.S. ex rel. Wolfish v. Levi*, 439 F.Supp. 114, 119-121 (S.D.N.Y. 1977). All the cells included windows facing the outside world. *Id.* at 121. MCC also had a rooftop recreation area equipped for basketball, paddleball and handball, to which all inmates had access one hour each day. *Id.* MCC contained no centralized commissary; pre-cooked meals were brought on trays to inmates in the common

areas where food could be reheated in the microwave ovens and consumed at leisure. *Id.*

The trial court's findings here supporting the orders which petitioners challenge cannot be understood without examining related conditions. Most generally, the Los Angeles County Central Jail is a much older facility (J.A. 70). Its inmates, who are housed in traditional cell blocks (P.A. 45-6), have nowhere near the degree of freedom available at the MCC, where inmates housed in "modular units" had free access to a multi-purpose room, balcony education area, and recreation for 16 to 19 hours per day. *Wolfish v. Levi*, 573 F.2d 118, 121 (2nd Cir. 1978).¹⁹

Considered in the light of these and other aggravating conditions, the challenged orders are minimal intrusions carefully selected and designed to alleviate the excessive deprivations extant within the Central Jail.

II. TOTAL PROHIBITION OF CONTACT VISITATION AT THE LOS ANGELES COUNTY JAIL INTERFERES WITH THE CONSTITUTIONALLY PROTECTED FAMILIAL RIGHTS OF DETAINEES AND THEIR FAMILIES.

A. Constitutionally Protected Familial Rights Are Impaired By The Denial Of Contact Visitation.

In *Bell v. Wolfish*, *supra*, 441 U.S. at 534-35, the Court specifically noted that it was not dealing with those fundamental liberty interests delineated in cases such as *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Meyer v. Nebraska*, 262 U.S. 390 (1923). However, the issue in the instant case implicates the very fundamental interests alluded to in *Wolfish*.

¹⁹ See also, the discussion at p. 3, *supra*, and n.1, *supra*.

The visiting system in the Los Angeles County Jail strikes at the most basic aspect of the family: the way family members relate to each other. Interposing a barrier between the detainee and his visitor makes it impossible for the detainee to kiss his child, to touch his wife, or to embrace his mother and father. Instead of physical closeness during a time of crisis, the detainee and his family are reduced to staring at each other across a barrier which precludes any meaningful communication.

The family relationship is as "old and fundamental as our civilization." *Griswold v. Connecticut*, *supra*, 381 U.S. at 496 (concurring opinion of Justice Goldberg). Marriage, the foundation of the family, has been characterized as the most important relationship in life. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Because of the special importance of these relationships, the Court has "long recognized" the protected nature of "matters of marriage and family life," *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977), and has acted to protect them.

The Court has been especially solicitous of the rights of parents with respect to their children. *Stanley v. Illinois*, *supra*; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, *supra*. These rights apply with no less force to pretrial detainees who, as a result of their incarceration for inability to post bail, have been forcibly separated from their children. "[W]hen blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

While no previous case in this Court dealt with the aspect of the familial rights at issue here, that does not obviate the application of these principles to the instant case:

To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to

child-bearing, e.g., *LaFleur*, *Roe v. Wade*, *Griswold*, *supra*, or with the rights of parents to the custody and companionship of their own children, *Stanley v. Illinois*, *supra*, or with traditional parental authority in matters of child rearing and education. *Yoder*, *Ginsberg*, *Pierce*, *Meyer*, *supra*. But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to . . . this case.

Moore v. City of East Cleveland, *supra*, 431 U.S. at 500-01; see also *Zablocki v. Redhail*, *supra*, 434 U.S. at 385. Indeed, several cases that have addressed this argument for contact visits have held that contact visits are required. *Cooper v. Morin*, 49 N.Y.2d 69, 399 N.E.2d 1188, 434 N.Y.S.2d 168 (1979);²⁰ *Wesson v. Johnson*, 579 P.2d 1165 (Colo. 1978) (en banc). See also *Wolfish v. Levi*, 573 F.2d 118, 126 n.16 (2nd Cir. 1978) (First Amendment associational right); *Boudin v. Thomas*, 533 F.Supp. 786, 792-93 (S.D.N.Y. 1982).

Forcing detainees and their families to visit through physical barriers unduly interferes with the "private realm of family life." *Moore v. City of East Cleveland*, *supra*, 431 U.S. at 499. As the court noted in *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977):

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in "promot[ing] a way of life" . . . *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972).

To prevail under this well-established body of constitutional law, plaintiffs do not have to prove that the denial of contact visitation necessarily has a permanent or irreparable impact upon family ties in all instances. For example the regulation

²⁰ While *Cooper* was decided as a matter of state constitutional law, it relied solely on federal cases dealing with familial rights.

invalidated in *Cleveland Board of Education v. LaFleur*, *supra*, did not prevent teachers from bearing children; it simply placed a "heavy burden" upon the exercise of that right (414 U.S. at 639). The statute at issue in *Zablocki v. Redhail*, *supra*, did not necessarily prevent all persons affected from marrying, but it did constitute a "serious intrusion" (434 U.S. at 387) into that subject; the fact that it "significantly interfere[d]" (*id.* at 388) with a fundamental right was sufficient for it to be struck down. The ordinance invalidated in *Moore v. City of East Cleveland*, *supra*, only affected family relationships in one small neighborhood of an extensive metropolitan area (431 U.S. at 550) (dissenting opinion of Justice White), and even there was by no means absolute (*id.* at 540-41) (dissenting opinion of Justice Stewart).

Plaintiffs hardly have to prove an increase in the divorce rate of prisoners at the Los Angeles County Jail, any more than plaintiffs in *LaFleur* had to prove an actual reduction in their birth rate or plaintiffs in *Moore* had to prove an outright dissolution of their family ties. It is sufficient to prove that barrier visiting severely weakens and interferes with the maintenance of family relationships. The record below amply demonstrates that it does.²¹

²¹ See also the many authorities cited by the New York Court of Appeals in *Cooper v. Morin*, *supra*, 49 N.Y.2d at 80-81, 424 N.Y.S.2d at 175: "The detrimental effect upon spousal and parent-child relationships of the denial of contact, if not obvious, is attested to . . . by . . . numerous books and articles (see McGowan & Blumenthal, *Why Punish The Children: A Study of Children of Women Prisoners*; Schwartz & Weintraub, *The Prisoner's Wife: A Study in Crisis*, 38 Fed.Prob. No.4, 20; Zemans and Cavan, *Marital Relationships of Prisoners*, 49 J.Crim.L. and Criminology 50; Simpson, *Conjugal Visiting in United States Prisons*, 10 Col. Human Rights L.Rev. 643; Note, *On Prisons and Parenting: Preserving the Ties*, 87 Yale L.J. 1408; Karten, *Mothers Behind Bars—What Happens To Their Children*) . . ."

Additionally, a plethora of scientific documentation shows that an integral part of parenting, and of the nurture that a child needs, is the comfort and reassurance that close, loving physical contact with a parent, including fathers, provides.²² If anything, the child's need to be touched and held by his or her absent parent increases when the child is deprived of that parent's accustomed presence during the period of incarceration.²³ One district court has recently noted that an infant child "cannot yet respond solely to visual contact" with its parents. *Boudin v. Thomas, supra*, 533 F.Supp. at 793. In such cases contact visitation must be permitted, because "no

²² For a general review of the early studies on the effects of father absence on children, see McCandles, *Children, Behavior and Development* 162-68 (2nd. Ed. 1967). One of the studies found that:

Five year-olds who lack consistent father figures in the home almost desperately seek attention from any male they can find who gives them so much as a nod.

Id. at 166.

²³ Michael Lamb's recent studies on interaction between fathers and their young children and infants indicate that the infant's attachment to his father and to his mother is equally strong. Lamb, "Father-Infant and Mother-Infant Interaction in the First Year of Life," 348 *Child Development* 167, 168 (1977). From the very beginning of life an infant "attaches" to parents based on various stimuli including "the tactile and kinaesthetic stimuli arising from human arms and body." J. Bowlby 1 *Attachment and Loss, Attachment* 255 (1969); Ainsworth, "Individual Differences in Some Attachment Behaviors," 18 *Merrill-Palmer Quarterly* 123 (1972). Lamb's results showed no preference for either parent in the attachment behavior; infants fussed to and were soothed by their fathers as often as their mothers. *Id.* at 177, 179. Lamb concluded

that infants are attached to both their parents from the beginning of attachment relations . . . the nature of the mother-infant and the father-infant interaction . . . [is] that infants develop different expectations and learn different behavior patterns from each parent and thus that the two relationships have differential consequences for socio-personality development. Developmental psychologists have long believed that mothers and fathers play different roles in the socialization of older children

alternatives to communication with infants by touch are available." *Ibid.* In short, a barrier visit between a detainee and his or her infant child or family is tantamount to no visit at all. The barrier does not merely render the visit frustrating and punishing, but rather totally deprives the detainee parent and the infant of the right to visit with each other.

B. Analyzed Under The Strict Standard Applicable To Deprivations Of Familial Rights, Total Prohibition Of Contact Visitation At The Los Angeles County Jail Violates The Due Process Rights Of Detainees And Their Visitors.

In *Bell v. Wolfish*, *supra*, the Supreme Court dealt with various aspects of the confinement of pretrial detainees. Not all of these were analyzed in precisely the same manner. Rather, it was the particular nature of the claimed interest affected by the condition or practice which controlled the nature of the constitutional analysis. For example, in discussing the double-celling issue, the Court noted that "the detainee's

and the data indicate that these differential roles may be continuous from early infancy.

Id. at 179. Accord, Lamb, "Fathers: Forgotten Contributors to Child Development," 18 *Human Development* 243, 246, 260 (1975).

Related earlier studies indicated that physical contact between mother and infant is innately gratifying or rewarding. P. H. Mussen, J. J. Conger and Kagen, *Child Personality and Development* 154 (1974). The literature also suggests a high correlation between deprivation of such contact and chronic tension and gastrointestinal disorders even in very young infants. Holding and handling by the attachment figures may be essential for the child's proper development. Ribble, *Infantile Experiences in Relation to Personality Development* (Hunger, 1944).

Moreover, the inmate needs to be able to touch other family and close friends. The primary attachments formed in infancy affect later secondary attachments. See Lamb, *supra*, 348 *Child Development* at 183. See also Huss, *Touch with Care or a Caring Touch*, 31 *Amer. J. of Occ. Ther.*, 11, 15 (1977).

desire to be free from discomfort . . . does not rise to the level of those functional liberty interests delineated in such cases as *Roe v. Wade*, 410 U.S. 113 (1973). . . ." *Bell v. Wolfish*, *supra*, 441 U.S. at 534-35. Accordingly, it proceeded to analyze the double-celling issue as a matter of punishment. In contrast, the application of the "publisher only" rule was analyzed under the First Amendment. *Id.* at 549-53. The Court not only looked to the principles regarding the application of the First Amendment in the prison context, *id.* at 550-51, but also engaged in traditional First Amendment analysis with regard to the neutrality of the restriction (i.e., it was without regard to the content of the expression), and the alternative means of obtaining reading material. *Id.* at 551-52. Similarly, the cell shake-down and body cavity search issues were analyzed under the Fourth Amendment. *Id.* at 555-60.

Because the restriction at issue in this case impinges on fundamental familial rights, this Court is required to entertain a more careful scrutiny of the balance between the interests involved. *Procunier v. Martinez*, 416 U.S. 396 (1974) (First Amendment right to correspondence). This scrutiny must be all the more exacting because the rights of third parties are also involved: the wives, husbands, children and parents of those incarcerated. *Id.* at 407-09. As Justice Powell's opinion for the Court in *Procunier* recognizes, an issue such as the constitutionality of restrictive mail or visiting regulations "implicates much more than the rights of prisoners." *Id.* at 408. Since the rights of unincarcerated persons are involved, and since fundamental values are at stake, the *Procunier* test controls:

First, the regulation or practice in question must further an important or substantial governmental interest. . . . Second, the limitation . . . must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Id. at 413. See *Kincaid v. Rusk*, 670 F.2d 737, 743-45 (7th Cir. 1982) (First Amendment right of access to books, magazines and newspapers); *Parnell v. Waldrep*, 511 F.Supp. 764, 767-69 (W.D.N.C. 1981) (same); cf. *Logan v. Shealy*, 660 F.2d 1007,

1013 (4th Cir. 1981) (Fourth Amendment right to be free from unreasonable searches and seizures).

Under this standard, defendants cannot conceivably justify the total prohibition on contact visiting at the Los Angeles County Jail. The complete elimination of all opportunity for all detainees to touch, hold and embrace their loved ones and especially their infant children is obviously "greater than is necessary or essential to the protection of the governmental interest involved." *Procunier v. Martinez*, *supra*, 416 U.S. at 413.

III. THE DISTRICT COURT'S ORDER THAT DETAINEES BE ALLOWED TO OBSERVE SEARCHES OF THEIR CELLS PROPERLY REMEDIES DEPRIVATIONS OF DETAINEES' PROPERTY WITHOUT DUE PROCESS OF LAW.

The district court's order requiring that detainees present in the vicinity of their cellblock be given the opportunity to observe searches of their cells and property is a narrowly tailored remedy that interposes minimal procedural safeguards against the arbitrary confiscation and destruction of detainees' property established by the testimony of prisoners and officers alike. See, e.g., the testimony of deputy sheriffs Ortiz (R.T. 10:2871) and McEntire (R.T. 11:2948-9).

In challenging the district court's order on cell search procedures, petitioners rely exclusively on this Court's holding in *Wolfish*, that the policy there of refusing pretrial detainees the right to contemporaneously observe searches of their cells does not violate the Fourth Amendment's ban against unreasonable searches and seizures. (Pet. Br. at 24-29). The holding in *Wolfish*, however, is not dispositive of that issue in this case.

It is clear that the trial court was interested in insuring that pretrial detainees not be deprived of their "meager possessions" without due process of law (P.A. 36).

Due process, after all, means fair treatment under the circumstances. I believe that to allow these prized posses-

sions to be confiscated under subjectively enforced regulations, without giving the possessor any opportunity to explain or protest or entreat, deprives him of his property without due process of law. (P.A. 28).

Since this Court has never addressed the denial of contemporaneous observation of cell searches as an infringement of pretrial detainees' due process rights, the specific and limited holding of *Wolfish* on the cell search issue is inapposite, particularly in light of the limited order here.²⁴

Moreover, in a later decision, *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court indicated that due process guarantees apply to the taking of prisoners' property. There in the context of holding that state court damage remedies for the negligent loss of an inmate's property satisfy the requirements of due process, the Court held that a hearing is required sometime before the state permanently deprives a prisoner of his property interests.

Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

Id., 451 U.S. at 540 (citation omitted).

The Court went on to find that a post seizure damage action was an adequate remedy in that the taking there at issue was "random and unauthorized" and the property irretrievable. *Id.*, 451 U.S. at 541.

In contrast, the property seizures challenged here are conducted pursuant to established jail procedures; and a post-seizure, in-jail procedure would be virtually impossible to

²⁴ The Court may address related issues in a presently pending case. See *Hudson v. Palmer*, 82-1630 and *Palmer v. Hudson*, 82-6695, ruling below, 697 F.2d 1220 (4th Cir. 1982), argued on December 7, 1983.

implement. Moreover, the seized items have a value to detainees well beyond their monetary cost (P.A. 28).

Petitioners' analysis also ignores the previously discussed distinctions between the MCC (the subject of the *Wolfish* litigation) and the Central Jail. There is no evidence in this record comparable to the expert testimony offered in *Wolfish* that "permitting inmates to observe room inspections would lead to friction between the inmates and security guards and would allow the inmates to attempt to frustrate the search by distracting personnel and moving contraband from one room to another ahead of the search team." *Wolfish, supra*, 441 U.S. at 555. Rather, the only testimony cited by petitioners which supports the prohibition of contemporaneous observation of cell searches (Pet. Br. at 30) is the speculation of Margaret Lombardi, a deputy sheriff for four years with no apparent expertise in security matters (R.T. 19:4113-4). Unlike *Wolfish*, no correctional expert testified convincingly here that permitting the contemporaneous observation of cell searches would present an imminent danger to the security of the facility. *Wolfish, supra*, 441 U.S. 555, n.36.

Moreover, many of the problems which petitioners foresee arising from the contemporaneous observation of cell searches are solved by the district court's adoption of "Method C," a procedure by which a row of cells is vacated, all prisoners taken to the dayroom, and are returned cell-by-cell to observe the searches of their quarters. (P.A. 35, R.T. 19:4124). This cell search procedure was one of four methods which the Sheriff's Department had itself designed and tested (R.T. 19:4122-24), and was the procedure, other than petitioners' original procedure, which could be safely implemented with the fewest number of deputies (Hearing Exhibit B). Thus, the procedure required by the district court's order is neither novel, nor untested, nor infeasible. Indeed, summarizing the results of the searches conducted under "Method C," Deputy Lombardi could detect only two problems. First, she speculated about the bizarre possibility of an inmate or an officer falling over a railing to the bottom tier when searches of upper-tier cells

were conducted (R.T. 19:4132-2). However, there is no indication in the record that this problem is any more serious at the time of cell searches than at any other time when officers remove prisoners from their cells on the upper tier.

Deputy Lombardi's second concern was that "the inmates did not care for that type of search . . . being forced to stand there and observing the officers going through their property" (R.T. 19:4133). However, this claim is controverted by the trial judge's own conversations with inmates whose "ready responses were that they preferred to be present so that they could see what was going on, and in order that they might seek to explain why certain questioned items should not be removed." (P.A. 36)²⁵ Indeed, during the trial judge's observation of the actual cell searches, he noted that a deputy sheriff reconsidered two decisions to remove certain magazines from a cell after the prisoner offered an explanation (P.A. 36).

In the instant case, petitioners' cell search procedure was not enjoined as unconstitutional *per se* but rather as being conducted in a manner abusive to detainees' property rights. Therefore, *Bell v. Wolfish* does not control the resolution of the precise issues at bar. The district court's determination that denying detainees at the Jail all opportunities to contemporaneously view the searches of their cells is an exaggerated response to over-inflated security concerns and its adoption of "Method C" is a reasonable means of assuring that plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment are adequately protected.

²⁵ A third concern cursorily referenced by Deputy Lombardi (R.T. 19:4116) and now relied upon by petitioners (Pet. Brief at 30), is that detainees would learn where to hide contraband if they were allowed to watch searches of their cells. However, Deputy Lombardi failed to explain the basis of this bald conclusion and omitted this concern from her testimony summarizing petitioners' criticisms of "Procedure C" (R.T. 19:4132-33).

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

FRED OKRAND
(Counsel of Record)
ACLU Foundation of
Southern California
633 S. Shatto Place
Los Angeles, CA 90005
213/487-1720

JOHN H. HAGAR, JR.
444 Lincoln Blvd.
Marin Del Ray, CA 90291
213/396-3498

ALVIN J. BRONSTEIN
EDWARD I. KOREN
ELIZABETH ALEXANDER
The National Prison Project
of the ACLU Foundation
1346 Connecticut Ave., N.W.
Washington, D.C. 20036
202/331-0500

Attorneys for Respondents

Office - Supreme Court, U.S.

FILED

MAR 17 1984

ALEXANDER L. STEVAS.

CLERK

No. 83-0317

IN THE

Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK, *et al.*,

Petitioners,

vs.

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

FREDERICK R. BENNETT,
Principal Deputy County Counsel,
Office of the Los Angeles
County Counsel,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1880,

Counsel for Petitioners.

Petition for Certiorari filed August 23, 1983.

Certiorari granted November 7, 1983.

TABLE OF CONTENTS

	Page
Argument	1
1. Jail Standards That Recommended Contact Visitation Are Not Controlling, Mandatory, nor Widely Accepted	1
2. The Fact That Other Jails or Prisons May Permit Contact Visitation Is Not Controlling. Not Only Do Many of Those Facilities Experience Significant Problems With Such Visitation, but the Central Jail Facility Is Uniquely Different	4
3. The "Totality" of Conditions at the Jail, to the Extent They Are Relevant, Militate Against Contact Visits	6
4. The Psychological, Emotional and Institutional Benefits That Are Argued to Result From Contact Visitation Are Not Free From Dispute	7
5. The Record Does Not Support a Conclusion That Risks Inherent in Contact Visits Can Be Adequately Avoided. Moreover, Security Measures Necessitated by Contact Visits Have Substantial Adverse Impact on Inmates	8
6. Defendants' Concerns With the Search Procedures Are Consistent With Concerns of Other Administrators, and at Least as Significant as Those That Justified Reversing the Order Requiring Similar Procedures in <i>Wolfish</i>	12
Conclusion	12
Appendix. Statutory Provisions	App. p. 1

TABLE OF AUTHORITIES

Cases	Page
Bell v. Wolfish, 441 U.S. 520 (1978)	1, 6, 11, 12
DeLancie v. Superior Court, 31 Cal.3d 865 (1982)	
.....	2
Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978)	4
Statutes	
California Administrative Code, Title 15, Sec. 1006(4)	
.....	3
California Administrative Code, Title 15, Sec. 1062	
.....	3
California Administrative Code, Title 15, Sec. 3170	
.....	2
California Penal Code, Sec. 2600	2
California Penal Code, Sec. 2601	2
California Penal Code, Sec. 6030	3

No. 83-0317
IN THE
Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK, *et al.*,

Petitioners,

vs.

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR,

Respondents.

PETITIONERS' REPLY BRIEF.

ARGUMENT.

1. Jail Standards That Recommended Contact Visitation Are Not Controlling, Mandatory, nor Widely Accepted.

The published standards of the National Sheriff's Association, the American Correctional Association, and the New York City Department of Corrections add little. Such standards are not controlling. *Bell v. Wolfish*, 441 U.S. 520, 544, n. 27 (1978) The National Sheriff's Association's standards contain a specific disclaimer that they are not the official position of the National Sheriff's Association (RT 4237; 4484:14-23). Uncontradicted testimony indicated such standards were designed as a guideline as to what courts were then ordering (RT 4238:4-9), and were never intended to be imposed on all sheriff's facilities (RT 4482:2-6). Uncontradicted testimony indicated that the American Correctional Association's standards were promulgated, at least in

part, on the assumption, later proved incorrect, that their adoption would immunize a facility from prisoners' rights litigation (RT 4483). Uncontradicted testimony indicated that the New York standards were adopted, at least in part, in the face of strong judicial statements as to what would be ordered, and to avoid further litigation (RT 4339:22-4340:1).

Plaintiffs also urge that California Penal Code Sections 2600 (Resp. Brief, p. 1), which provides that state prison inmates may be deprived of only such rights as necessary to provide for the reasonable security of the prison and the public; and 2601 (*id.*), which provides that state prisoners retain a right "[t]o have personal visits" subject to the reasonable security of the institution, add little, even if they might be construed as applicable to jails, as well as prisons. Cf. *DeLancie v. Superior Court* (1982) 31 Cal.3d 865, 872 and n. 6.¹

Even if these provisions were applicable, the Jail is in compliance with Sections 2600 and 2601. These sections do not require or specify contact visits, but merely require that inmates be permitted personal visits, a right which is extant at Central Jail.

Plaintiffs further reliance on the administrative regulations of the State Department of Corrections for the operation of its own prisons is misplaced, however. Section 3170² of Title 15 of the California Administrative Code is

¹*DeLancie* dealt with a different issue, the monitoring of inmate conversations. Moreover, the court said specifically in note 6 (31 Cal.3d at 872): "We do not imply that county jails must follow exactly the same procedures as are followed in state prisons. Whether a measure is essential to institutional security will depend on many factors, and thus may vary from one facility to the next. We hold only that detainees' status as inmates in a county jail instead of state prison in itself is no reason to deny them rights afforded prison inmates."

²Section 3170 limits the use of barriers to prevent physical contact during visitation at state prisons (See Resp. Brief, pp. 1-2).

contained in Division 3, Chapter 1, "Department of Corrections . . . Rules and Regulations of the Director of Corrections," and is applicable only to "persons committed to the custody of the director, and to all employees of the Department of Corrections." California Administrative Code, Title 15, Chapter 1, *Preface*. These are the Director's rules and regulations for his own prisons.

With regard to local jails, however, the Department of Corrections also has the duty to prescribe Minimum Jail Standards. California Penal Code Section 6030. These standards are set forth in Division 1 of Title 15 of the California Administrative Code. With regard to jails, §1062 of Title 15 of the California Administrative Code provides in pertinent part: "Contact visits shall be allowed at least to minimum security prisoners housed in Type III and Type IV facilities and in Type II facilities *which are designed and constructed for contact visits.*" [Emphasis added.].

Central Jail is a Type II facility,³ and under California Minimum Jail Standards is not required to permit contact visitation even as to minimum security inmates unless it was designed and constructed to permit such visits. Central Jail was not designed and constructed to permit contact visits (Lonergan Affidavit, CT 216); and, in any event the Jail has been certified as in compliance with California Minimum Jail Standards by the Department of Corrections. (Id.)"

The significance of these provisions is not only a recognition of the differences in security risks at jails and prisons, but also, consistent with the record in this case, a recognition that contact visitation is generally not feasible

³California Administrative Code, Title 15, §1006(4) provides: "'Type II facility' means a local detention facility used for the detention of persons pending arraignment, after arraignment, and during trial, and upon a sentence of commitment. Detention in such facilities may be indefinite during trial and up to one year upon commitment."

at a facility that was not designed and constructed to permit them. (Lonergan, RT 4540-46; Sumner, RT 4606:4-4608:13; Gaston, RT 4322:23-4323:8; Nagel, RT 4186:20-4187:14; Patterson, RT 4593-97)

2. The Fact That Other Jails or Prisons May Permit Contact Visitation Is Not Controlling. Not Only Do Many of Those Facilities Experience Significant Problems With Such Visitation, but the Central Jail Facility Is Uniquely Different.

The plaintiffs argue that most prisons, and an increasing number of jails, permit contact visits. However, six to eight years before the trial of this matter (when Central Jail was constructed), contact visits in jails was not the practice (Nagel, RT 4158:13-14). Some jails that later implemented contact visits are now considering discontinuing them because of the resulting problems (RT 4437-38). Many prisons which permit such visitation do so, not because it is risk-free, but because for their inmates under their circumstances, the administrators believe the benefits outweigh the risks (Patterson, RT 4588:20-24; Sumner, RT 4601:16-19; Nagel, RT 4167:5-6).

This is not to say that contact visitation is not feasible in some facilities throughout the country. Nevertheless, contact visitation has at the same time caused serious problems, particularly in local jails of considerable size (RT 4547). The fact that some institutions permit contact visitation is not controlling, and merely represents differences in opinion as to what those responsible for those institutions consider to be prudent there. *Cf. Feeley v. Sampson*, 570 F.2d 364, 373 (1st Cir. 1978).

Moreover, the simple answer is that there is no other institution similar to Men's Central Jail. The plaintiffs point out that Central Jail, with a rated capacity in excess of 5,000

inmates, is the largest facility in the country, with the next largest having about half as many prisoners.⁴ The professed experts who testified for plaintiffs had little experience with such a facility. Nagel had seen one jail with a population over 2,000 (RT 4215:9-25); Patterson stated Central Jail was unlike anything he had ever had any experience with in terms of management (RT 4591:2-3). Gaston, who was the warden of New York City's largest facility, testified that there was no way you could have a viable contact visitation operation at Central Jail (RT 4316).

In addition, the inmate population and the problems it presents is unique at Central Jail. Plaintiffs' expert recognized that the nature of a jail's inmates differs enormously around the country (Nagel, RT 4222:11-13), and the resulting security concerns differ, as well (Nagel, RT 4223:5-8). The staff at Central Jail must deal with a substantial violent and narcotic oriented jail gang problem which is not prevalent in other jails, such as New York's facilities (Gaston, RT 4323-4; Lonergan, RT 4453). The drug problems in Los Angeles County are severe (RT 4266:12-16), and involve much greater use of dangerous psychotropic drugs than elsewhere in the country.⁵

⁴The unique size of this facility is a reflection of the unique character of the County of Los Angeles in terms of area and population. The County of Los Angeles is a large metropolitan county with a population in excess of 7,000,000 people, and unlike other large metropolitan areas, the population is densely spread over 4,000 square miles (JA 55). The centralization of pretrial detainees is necessitated by the fact that, under California law, the sheriff must transport about 20 percent of them each day to 26 separate jurisdictional courts located over this wide expanse, and that prisoners often have mandatory court appearances in more than one of these courts during their stay (JA 73-75).

⁵Such as phencyclidine (PCP), which is easily concealable. Small dosages can cause violent and psychotic reactions hours or days after ingestion (RT 4417:17-22; 4418:4-10). Unlike most other facilities (Nagel, RT 4253:3-9; Gaston, RT 4329:11-12; 4329:18-25), a substantial portion of Central Jail's population are actual or potential PCP abusers (RT 4420:3-9).

3. The "Totality" of Conditions at the Jail, to the Extent They Are Relevant, Militate Against Contact Visits.

Plaintiffs argue that because Men's Central Jail is an "old"⁶ facility which differs from the MCC facility at issue in *Bell v. Wolfish*,⁷ and that because of the "totality" of other conditions at the Jail (which were found by the District Court to be constitutionally adequate),⁸ that a different and more strenuous standard of review than that promulgated in *Wolfish* should be applied to the questions of contact visits and the search procedures at issue in this case.

There is no indication that the District Court considered such factors, and it is difficult to see how such factors are rationally connected to the visitation and search procedures.

There is nothing inherent in the age or design of the facility itself that enhances the importance of contact visits or minimizes the legitimacy of the security concerns. To the contrary, most experts agreed that the security risks are greater when a contact visit program is imposed on a facility not designed for it than when a facility is designed to permit it (*Cf.*, Nagel, RT 4228:4-7; Lonergan, RT 4540-46; Sum-

⁶"Old" is a relative term. The original facility was built in 1963, and the major addition thereto, which houses about one-half of the inmates, was designed shortly before trial, about 1975. (Anthony Affidavit, CT 216). At the time these facilities were designed, every effort was made to incorporate the then most were advanced and accepted philosophies concerning detention facilities. (*Id.*) Both facilities complied with Minimum Jail Standards promulgated by the State of California under state law (Lonergan affidavit, attachment, CT 270-271).

⁷The majority opinion states that the Court's analysis "... does not turn on the particulars of the MCC concept or design. . . ." *Bell v. Wolfish*, *supra*, 441 U.S. at 525.

⁸The "totality" of conditions now disparaged by plaintiffs were either found by the District Court to meet constitutional mandates, or orders changing the conditions brought them into line with constitutional requirements. These matters were not appealed, and should be presumed constitutional as the District Court concluded.

ner, RT 4186-87; Gaston, RT 4322-23; Patterson, RT 4593-97).

In pointing out the differences between the MCC facility and Central Jail, other than the relative age of these facilities, the plaintiffs concentrated on the relative degree of freedom of movement⁹ at the two facilities (Resp. Brief, p. 26). Whatever relevance this factor has, it is clear that implementing contact visits will substantially reduce the freedom of movement within the Central Jail facility in order to minimize the intermixing of inmates after visits (Gaston, RT 4330:14-20).

If the "totality" of conditions are to be considered, a court should consider those factors that may minimize the need for contact visits. Those factors would include the high volume of non-contact visits permitted on a daily basis without approved visitor lists or intrusive security measures, and the alternative means of maintaining contact with family and friends through regular access to telephones and unrestricted mail.

4. The Psychological, Emotional and Institutional Benefits That Are Argued to Result From Contact Visitation Are Not Free From Dispute.

The only two studies placed in evidence concluded that there was no correlation between permitting contact visits and institutional benefits.¹⁰

⁹It is a misconception to view inmates at Central Jail as confined to their cells most of the day. To the contrary, the inmates are engaged in almost continual movement throughout the day (Robbins affidavit, CT 218, *et seq.*).

¹⁰The Report of the California Department of Corrections, Research Division, "Explorations in Inmate Family Relationships" (Exhibit 5), the Department's official position (RT 4639:19-4640), concluded:

"Prison officials may be disappointed to learn that even numerous contacts with families and friends have little value as a controlling influence on behavior." (RT 4242).

The other study concluded:

"No statistically significant relationship has been shown between the amount of disciplinary infractions committed and the inmates' personal contact with the outside community. The demonstrated occurrence can be disregarded as merely a chance occurrence in a random sample." (RT 4241).

Plaintiffs have submitted a considerable amount of material on the psychological and emotional impact of denial of physical contact during visitation, and the adverse resulting impact on familial relationships. Plaintiffs' psychiatrist, however, while emphasizing the importance of contact visitation, recognized that the fact of detention itself is one of the most significant factors adversely affecting the inmate and his family (Kupers, RT 4656-57), that contact during visits was not necessarily the paramount means of maintaining communication with family and friends, that frequency of visits, access to telephones and mail may be of equal importance (Kupers, RT 4657A:25-4658:3; 4659:15-22), and that reasonable men within the field could differ as to the relative importance of these factors (Kupers, RT 4660:10-14). Another psychiatrist indicated that he could not say that contact visitation was more beneficial to the inmate than non-contact visitation (Verin, RT 4491:10-13), that contact visits may increase tensions (Verin, RT 4491:14-21), and that the risks inherent in contact visitation outweigh the benefits to the inmates (Verin, RT 4496).

5. The Record Does Not Support a Conclusion That Risks Inherent in Contact Visits Can Be Adequately Avoided. Moreover, Security Measures Necessitated by Contact Visits Have Substantial Adverse Impact on Inmates.

Plaintiffs contend that the risks inherent in contact visits can be adequately dealt with through strip searches of inmates, searches of visitors, metal detectors and fluoro-

Even plaintiffs' experts recognized that there is a wealth of diversity of conclusions among respected persons in the field (Nagel, RT 4243:4-15). The warden of the New York Riker's Island facility, the City's largest, which has permitted contact visitation for years, stated there was no quantifiable evidence that contact visits reduce tension (Gaston, RT 4294:20-21); and, that they may increase tensions (*id.*, RT 4295-96; 4297:14-19).

scopes, surveillance, classification, and other measures.

There is almost universal agreement, however, that notwithstanding such measures, contact visitation will result in a significant increase in contraband within the jail, particularly narcotics. The district court so concluded: "Any program of contact visits does increase the importation of narcotics into a jail despite *all* safeguards." (Supp.Mem. Dec., PA 31; emphasis added). This is consistent with the weight of the testimony in the record.¹¹

The primary method used is "ballooning".¹² Even plaintiffs' expert agreed the method generally cannot be detected (Nagel, RT 4167:5-6). Drugs do not show up on metal detectors and fluoroscopes (Nagel, RT 4170:9-10). The method is so pervasive at a New York jail that permits contact visitation, and uses the security measures advocated by plaintiffs, that the balloons used by the inmates have clogged the jail's sewer system (Gaston, RT 4287:14-4288:4).

While there are other means of smuggling contraband into a facility, most of the officials who testified felt that contact visits were the primary source of such contraband (Gaston, RT 4285, 4300, 4303; Lonergan, 4439:4-14; Sumner, RT 4602:6-11).

¹¹Plaintiffs' expert Patterson, a former prison warden, agreed that it is a foregone conclusion that you will get more contraband with contact visitation (RT 4594:14-17). The warden of a New York Jail that has had contact visitation for a number of years felt that the introduction of narcotics at his facility through contact visits was a pervasive problem (Gaston, RT 4286:2). Plaintiffs' expert Nagel recognized that the passage of drugs in balloons can't be detected (RT 4170:21-22), that there were numerous risks in contact visitation (RT 4167:5-6), and that surveillance, although important, was not adequate (RT 4234). Cf., the testimony of the warden of San Quentin (Sumner, RT 4604:8-19; 4602:2-11).

¹²A process whereby narcotics are placed in a balloon, secreted on a visitor or in his mouth to avoid detection, passed to an inmate during a kiss or other contact (RT 4605:12-14), swallowed or concealed by the inmate and retrieved at a later time (RT 4287:14-4288:4).

Whether classification is an adequate means of identifying low risks is subject to considerable question. Even plaintiffs' main expert wrote: "Because people are so unpredictable, a person who is not an escape risk at one moment may become one overnight" (Nagel, RT 4264:5-11). Even if classification worked for this purpose, however, it is not feasible to prevent the intermixing of prisoners at this facility (Gaston, RT 4331:23-4332:20). Most administrators agreed that within jails and prisons there would be considerable pressure from those not permitted contact visits to coerce those who are to bring in contraband for them (Nagel, RT 4178:4-11; 4251:5-10; Gaston, RT 4294:4-8; Sumner, RT 4610:16-19; 4611:5).

The problems resulting from narcotics, and the efforts by inmates to control the trafficking in them, are serious and life-threatening (Sumner, RT 4602:2-10), particularly in this facility which has to deal with several well organized jail gangs which seek to control drug trafficking through violence (Lonergan, RT 3741-45; Exhibits ES, ET; cf., Gaston, RT 4325-28).

Although drug trafficking is a major concern, it is not the only concern with contact visits. Metal detectors are ineffective in locating weapons and knives secreted in body cavities (Sumner, RT 4608:16-19), or plastic weapons and explosives (Lonergan, RT 4442). Administrators also expressed concern with altercations in the visiting areas (Gaston, RT 4291:21-22; Nagel, RT 4167:12-13), increased homosexual rapes, and sexual tensions (Verin, RT 4491:20-27; Gaston, RT 4296-97), increased tensions (Verin, RT 4491; Exhibit 5; RT 4639-41; Gaston, RT 4295-96), and the taking of hostages (Gaston, RT 4322).

The measures advocated and universally used by those who permit contact visits, to attempt to minimize these

inherent risks, have adverse consequences to the inmates that must also be considered.

The most obvious of these, and the one measure that was consistently agreed upon by all as a necessary concomitant to contact visitation, was a strip search of the inmates after visitation. As Justice Marshall ably pointed out in his dissent in *Wolfish*, the lower court in *Wolfish* found the strip search procedure "unpleasant, embarrassing and humiliating;" psychiatric testimony indicated that the procedures placed the inmates in the most degrading position possible, and other evidence indicated that the searches engendered among detainees fears of sexual assault, were the occasion for physical abuse, and caused some inmates to forego personal visits (441 U.S. at 578). Close and constant monitoring of contact visits may adversely disrupt the visits (*Wolfish*, n. 40, 441 U.S. at 560). The intrusive screening measures may be resented by visitors (Gaston, RT 4350:21-22).

Despite all reasonable safeguards, contact visitation uniquely creates substantial breaches of a facility's security, involving risks of harm to inmates and staff. Given these inherent and genuine risks, the substantial adverse impact of the necessary security precautions, and the numerous non-physical contact alternatives for maintaining a prisoner's relationships with his friends and relatives through frequent non-contact visitation, telephone calls, and mail, a determination to reject contact visitation in favor of these alternatives, should not, as a matter of law, be considered such an exaggerated response to security concerns that federal court intervention on constitutional grounds is warranted. The decision to assume these risks or to choose alternative methods should properly be the decision of the jail administrators or of the state or local agencies under whose laws they operate. Cf., *Wolfish, supra*, 441 U.S. at 562.

6. Defendants' Concerns With the Search Procedures Are Consistent With Concerns of Other Administrators, and at Least as Significant as Those That Justified Reversing the Order Requiring Similar Procedures in *Wolfish*.

Plaintiffs relegate to a footnote and seek to minimize certain of defendants' primary concerns with permitting inmates to view searches of their cells (Resp. Brief, n. 25). Yet, these concerns were set forth at the outset as major concerns. When Deputy Lombardi was asked about the sheriff's concerns with regard to the ordered procedures, her initial response indicated: "If they know where we search, they know where not to hide the contraband. . . . The closer we get to the contraband, the more upset they become, the more apt they are to become involved in an altercation with the officer. . . . They become very hostile and they want to distract the deputy searching, pull him away from whatever he is doing. (RT 4116:21 to 4117:4).

These concerns are very similar to those expressed by the warden of San Quentin Prison: "He is going to watch your cell search method and see where you miss, what areas you don't search. He is going to cause a problem if you start to get close to something he has hidden." (RT 4621: 13-16).

These concerns and the other concerns set forth in petitioners' opening brief are indistinguishable in terms of significance or genuineness from those that justified reversing the order requiring similar search procedures in *Wolfish*.

Conclusion.

For these reasons and the reasons set forth in petitioners' opening brief, the Court should reverse the opinion of the Ninth Circuit of July 14, 1983, affirming the judgment of the District Court of August 8, 1980, requiring the Sheriff

of the County of Los Angeles to permit contact visitation,
and to conduct routine cell searches in the presence of avail-
able inmates at Los Angeles County Men's Central Jail.

Respectfully submitted,

FREDERICK R. BENNETT,

Principal Deputy County Counsel,

Counsel for Petitioners.

APPENDIX.

Statutory Provisions.

California Administrative Code, Title 15

Division 1, Subchapter 4, Minimum Standards for Local Detention Facilities.

* * * *

§1006 Definitions

* * * *

(4) 'Type II facility' means a local detention facility used for the detention of persons pending arraignment, after arraignment, and during trial, and upon sentence of commitment. Detention in such facilities may be indefinite during trial and up to one year upon commitment.

§1062 Visiting

* * * *

Contact visits shall be allowed at least to minimum security prisoners housed in Type III and Type IV facilities and in Type II facilities which are designed and constructed for contact visits.

Division 3. Department of Corrections.

Chapter 1. Rules and Regulations of the Director of Corrections.

PREFACE

* * * *

The rules and regulations of the director apply to all persons committed to the custody of the director, and to all employees of the Department of Corrections.

Article 7. Visiting.

§3170 General Visiting Policy [pertinent text set forth in Respondents' Brief, pp. 1-2].

COPIES FILED
FEB 14 1983

No. 83-317

IN THE
Supreme Court of the United States
October Term, 1983

SHERMAN BLOCK, *et al.*,

Petitioners,

v.

DENNIS RUTHERFORD, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS*
CURIAE AND BRIEF OF *AMICUS CURIAE*
NEW YORK CITY BOARD OF CORRECTION
IN BEHALF OF RESPONDENTS**

PEGGY C. DAVIS
New York University School of Law
40 Washington Square South
New York, New York 10012
(212) 598-2713
Counsel of Record for Amicus Curiae

BARBARA E. DUNKEL
New York City Board of Correction
51 Chambers Street
New York, New York 10007
(212) 964-6307
Of Counsel

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The New York City Board of
Correction ("the Board") is an agency of
City government whose members are
appointed by the Mayor of the City of New
York, the City Council, and the presiding
justices of the intermediate appellate
courts within the City of New York.¹ Its
mandates include 1) regular inspection
and oversight of the operations of the
Department of Corrections ("the
Department");² 2) promulgation of
"minimum standards for the care, custody,
correction, treatment, supervision, and

¹ New York, N.Y., New York City
Charter and Administrative Code
§626(a) (1981).

² New York, N.Y., New York City
Charter and Administrative Code
§626(c) (1981).

discipline" of inmates in City custody;³
and 3) the hearing of grievances of A)
persons in the custody of the Department
and B) employees of the Department.⁴

The City of New York, like the
County of Los Angeles, bears the burden
of balancing fiscal, security,
constitutional and public policy concerns
as it meets its obligation safely to
detain large numbers of pretrial
detainees and short term sentenced
inmates in a large, urban setting.

³ New York, N.Y., New York City
Charter and Administrative Code
§626(e) (1981).

⁴ New York, N.Y., New York City
Charter and Administrative Code
§626(f) (1981). The Board of Correction
is an entity of the City of New York. It
functions as an independent oversight and
review body which is not subject to the
direct control of the City, its Mayor or
the Commissioner of Correction. Neither
(Footnote cont'd)

In the City of New York, as in the County of Los Angeles, this difficult balancing process has been affected by Federal court intervention at the behest of classes of inmates.

Any determination by this Court which addresses the proper reach of Federal constitutional standards for confinement of pretrial detainees will necessarily affect the dynamic within which our correctional system, and those of other cities and counties across the country, must set priorities and allocate resources.

For these reasons, the Board, which has long and intensive experience with the implementation and operation of

(Footnote cont'd)
the City, the Mayor or the Department has taken a position in this litigation.

contact visiting, and which must oversee and regulate a complex, urban correctional system within the context of Federal constitutional standards, respectfully requests leave to present its views concerning the appropriateness of the decision below requiring contact visitation for certain longer term, low risk inmates. The Board will not review the legal issues so thoroughly and ably addressed by the parties. It seeks rather to elucidate issues essential to judging whether the absolute prohibition of barrier free visitation is punitive or justified by legitimate non-punitive interests by reference to its unusual expertise and experience.

The Board offers no submission concerning the remaining issue before the Court.

WHEREFORE, the Board respectfully moves that the attached brief amicus curiae be accepted and filed with the Court.⁵

Respectfully submitted,

PEGGY C. DAVIS
New York University
School Of Law
40 Washington Square South
New York, New York 10012

Attorney for Amicus Curiae

⁵ Respondents have given their consent to the filing of this brief in a letter which is enclosed herewith.

INDEX

	<u>PAGE</u>
Statement of Interest of Board of Correction of the City of New York.....	1
Summary of Argument.....	9
Argument.....	10
Conclusion.....	28

TABLE OF AUTHORITIES

Cases:

Ambrose v. Malcolm, 440 F. Supp. 51 (S.D.N.Y. 1977).....	11
Bell v. Wolfish 441 U.S. 520 (1978).....	5
Detainees of the Brooklyn House of Detention v. Malcolm, 421 F. Supp. 382 (E.D.N.Y. 1976).....	12
Forts v. Malcolm, 426 F. Supp. 464 (S.D.N.Y. 1977).....	11
Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974), <u>aff'd</u> , 507 F. 2d 333 (2d Cir. 1974).....	11, 16, 24
Rhem V. Malcolm, 527 F. 2d 1041 (2d Cir. 1975).....	11

Rhodes v. Chapman 452 US 337 (1980).....	5
<u>Other Authorities:</u>	
AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF STANDARDS (1966)....	12
NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS (1973).....	12
NATIONAL SHERIFF'S ASSOCIATION, A HANDBOOK ON INMATES' LEGAL RIGHTS (1974).....	12
NEW YORK CITY BOARD OF CORRECTION, STUDY OF SUICIDES: 1978-83 (1983).....	17
New York, N.Y., New York City Board of Correction, Minimum Standards for New York City Correctional Facilities (1978).....	22
New York, N.Y., New York City Charter and Administrative Code (1981).....	1, 2, 4
New York State Commission of Correction, Minimum Standards for Local Correctional Facilities (1976).....	13
<u>On Prisons and Parenting:</u> <u>Preserving the Tie That</u> <u>Bind, 87 YALE L.J. 1408</u> (1978).....	19

Preliminary Hearing on Minimum Standards, 1976: Hearing Before the New York City Board of Correction (June 21, 1976).....	20
N. E. SCHAFER, A DESCRIPTIVE STUDY OF POLICIES AND PRACTICES RELATED TO THE VISITING OF PRISONERS IN CORRECTIONAL INSTITUTIONS (1977).....	12
Minimum Standards Subcommittee, 1977: Hearing Before the New York City Board of Correction (June 30, 1977)...	13, 21
Submission to the New York City Board of Correction by Prison Families Anonymous, June, 1977.....	18

No. 83-317

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

SHERMAN BLOCK, et al.,

Petitioners,

v.

DENNIS RUTHERFORD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE BOARD
OF CORRECTION OF THE CITY OF
NEW YORK IN BEHALF OF RESPONDENTS

STATEMENT OF INTEREST

The Board of Correction of the City of New York ("the Board") was established in 1957 and is required regularly to inspect all detention and correctional facilities operated by the City of New York through its Department of Correction ("the Department"); to promulgate minimum standards for secure and appropriate confinement of persons confined to the custody of the Department and to hear grievances of both inmates and Department employees.¹ The Board, an independent agency consisting of appointed Members and a full-time professional staff, has the additional

¹ New York, N.Y., New York City Charter and Administrative Code §§626 (a), (c), (e) and (f) (1981).

duty of regular communication with the Mayor and the Council of the City of New York concerning Department performance ² and the power to enforce its designated authority.³ In these respects, it shares responsibility with the Mayor and the Department for assuring safe confinement of all inmates and the maintenance of non-punitive conditions for pretrial detainees.⁴

² New York, N.Y., New York City Charter and Administrative Code §626 (d) (1981).

³ New York, N.Y., New York City Charter and Administrative Code §626 (d) (1981).

⁴ The Department presently confines nearly 10,000 men, women and adolescents in fifteen facilities throughout the City of New York. Approximately seventy per cent of these inmates are awaiting trial on criminal charges.

The views and experience of the Board may be useful in the resolution of the issues before the Court in three respects.

First, in 1978 the Board promulgated minimum standards for the operation of New York City correction facilities, one of which addresses contact visitation. The concept of minimum standards requires emphasis. The duty of the Board is to represent the broader interests of the citizens of New York rather than to serve as an advocate for any particular interest or group. Moreover, it has the power and duty, imposed by the Charter of the City of New York,⁵ to promulgate standards by which

⁵ "The board may institute proceedings in a court of appropriate
(Footnote cont'd)

the Department is legally bound and to see to their enforcement. The Board's standard setting process is not, then, merely advisory or an exercise in development of ideal detention and correctional policy. Its standards are minimum requirements, developed through an extended process of weighing fiscal concerns, the requisites of secure confinement, State and Federal constitutional constraints and the policy issues raised by the quality of the environment in which inmates are confined

(Footnote cont'd)
jurisdiction to enforce its subpoena power and other authority pursuant to this section." New York, N.Y., New York City Charter and Administrative Code §626 (g) (1981). While the Board has had no occasion to test its authority to enforce minimum standards, the important consideration in this context is that the Board regarded its standard setting as a process by which binding regulations were being established.

and in which correction officers must work.

This court has observed that the recommendations of standard setting bodies "may be instructive in certain cases...[but] do not establish constitutional minima", Bell v. Wolfish, 441 U.S. 520, 544, n. 27 (1978), see also, Rhodes v. Chapman, 452 U.S. 337, 348, n. 13 (1980). We believe that the process and product of the Board's effort to devise minimum and enforceable standards is particularly instructive in the context of this litigation.

Second, for nearly five years the Board has closely monitored the operation of a contact visitation program much more permissive than that required by the District Court with respect to the Los Angeles County Central Jail. It has

observed the implementation and expansion of contact visiting in facilities ranging in population from less than one hundred to several thousand; in facilities located in the urban centers of four of the five boroughs of the City of New York and in the massive correction complex on Rikers Island; and in facilities which range, in terms of condition and design quality, from the large, widely criticized, fifty year old House of Detention for Men on Rikers Island to the recently renovated, state of the art Manhattan House of Detention.

No two jail systems are alike, and the needs and capabilities of each must be determined individually. Nonetheless, the experiences of other, comparably complex detention systems in managing visitation are of some relevance in judging whether the courts below

properly determined that the denial of barrier free visits to every pretrial detainee in the Los Angeles County Central Jail was an unconstitutionally excessive response to security and administrative concerns.

Finally, detention conditions are determined by a complex dynamic in which the influence of Federal constitutional law figures importantly. The Board is a local entity with oversight responsibility for an unusually large and difficult detention system. It is required simultaneously to respond to public safety needs; to contend with the understandable problems inherent in attracting resources to jail and prison systems and to guard against the everpresent risk that conditions of pretrial confinement will deteriorate to an unconscionable level as resources are

drained to more attractive causes. The system for which the Board is responsible has been the subject of much litigation. It is the Board's view that both overintrusiveness on the part of Federal courts and excessive deference to local administrative judgments and preferences can have devastating effects upon the ability of any locality to provide minimally decent conditions of confinement for detention populations. The Board, therefore, has an urgent interest in the manner in which the actions of the courts below are judged here. For that judgment will explicate the role of Federal constitutional law in establishing minimum conditions of pretrial confinement and will, therefore, affect the dynamic within which the Board and its counterparts attempt to maintain safe and humane systems of detention.

As the Board has no standard governing cell searches, it makes no submission on that issue.

SUMMARY OF ARGUMENT

The expertise of the Board, developed in part through the process of promulgation of minimum standards for visitation in New York City facilities, and the experience of the Board in monitoring the implementation of an extensive program of barrier free visitation in a system as complex as that of Los Angeles County indicate that the courts below did not misjudge the punitive character of closed booth visitation or the excessiveness of the absolute prohibition of barrier free visitation in the Los Angeles County Central Jail.

ARGUMENT

THE FACTS WHICH FORMED THE BASIS OF THE BOARD'S REQUIREMENT THAT BARRIER FREE VISITATION BE PERMITTED WITHIN THE NEW YORK CITY CORRECTION SYSTEM AND THE BOARD'S EXPERIENCES IN MONITORING COMPLIANCE WITH THAT STANDARD SUGGEST THAT THE ABSOLUTE DENIAL OF CONTACT VISITATION IN THE LOS ANGELES COUNTY CENTRAL JAIL IS AN UNREASONABLE, EXAGGERATED RESPONSE TO LEGITIMATE SECURITY CONCERNS.

A. The Board's Establishment of Minimum Visitation Standards for the City of New York.

As we have indicated, development of the Board's minimum standards required reconciliation of public safety, fiscal, administrative and constitutional concerns. Promulgation of the standards was preceded by more than a year of research, circulation of drafts for review and comment by pertinent City agencies, negotiating sessions with the Department and public hearings.

Substantial redrafting occurred as a result of consultation with the Department, the Mayor and the Office of Management and Budget regarding the feasibility, cost and implementation date of each standard.

In considering whether and to what extent barrier free visitation should be permitted, the Board was, of course, guided by existing Federal precedent by which contact visitation had been held to be required for at least some suitably classified pretrial detainees in certain New York City facilities.⁶

⁶ See Rhem v. Malcolm, 371 F. Supp. 594, 602-603 (S.D.N.Y. 1974), aff'd, 507 F.2d 333, 338 (2d Cir. 1974); Rhem v. Malcolm, 527 F.2d 1041 (2d Cir. 1975); Ambrose v. Malcolm, 440 F.Supp. 51 (S.D.N.Y. 1977); Forts v. Malcolm, 426 (Footnote cont'd)

The research process described above revealed virtual unanimity among correction specialists in disapproving the routine maintenance of physical barriers between detainees and their visitors⁷ and established that barrier free visitation was available to most sentenced inmates across the country.⁸

(Footnote cont'd)

F.Supp. 464 (S.D.N.Y. 1977); Detainees of the Brooklyn House of Detention v. Malcolm, 421 F.Supp. 382 (E.D.N.Y. 1976).

⁷ See AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF STANDARDS 48-50, 543-544 (1966), NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS 68 (1973), NATIONAL SHERIFF'S ASSOCIATION, A HANDBOOK ON INMATES' LEGAL RIGHTS 42 (1974).

⁸ A survey of 168 correctional institutions revealed that 167 provided contact visits, N. E. SCHAFER, A DESCRIPTIVE STUDY OF POLICIES AND PRACTICES RELATED TO THE VISITING OF PRISONERS IN CORRECTIONAL INSTITUTIONS 56-57 (1977).

Contact visitation was (and is) available to sentenced inmates in the State of New York by administrative regulation enacted pursuant the Correction Law.⁹

While these factors were instructive, they could not resolve the issue for the Board. Direct experience with institutional visitation with and without the use of physical barriers was crucial to the Board's determination as to whether the use of such barriers could be justified for detainee and short term sentenced populations.

⁹ New York State Commission of Correction, Minimum Standards for Local Correctional Facilities, Section 7008.2 (b) 1976. The extensive contact visiting program in New York State prisons was thought to have reduced tension and improved morale throughout the system. Minimum Standards Subcommittee, 1977; Hearing Before the New York City Board of Correction (June 30, 1977) (testimony of (Footnote cont'd)

Direct observation of visitation with the use of physical barriers is perhaps necessary to full comprehension of its stigmatizing and dehumanizing effects.¹⁰ The impact upon inmate and visitor of the presence of the physical barrier is profound. It not only prevents the physical contact which is so important to meaningful communication between parents and children and between spouses, it calls forth the implication that the inmate is a pariah who, despite confinement in a locked, regimented, closely guarded facility, cannot safely be released from an

(Footnote cont'd)
the Honorable Mario Cuomo, Secretary of State, State of New York, Transcript 34-35.

¹⁰ Representative photographs of booth and barrier free visitation areas are attached as Appendices A-D.

isolated, sealed space in the presence of family and other authorized visitors.

Aspects of the psychological impact of closed booth visits had been revealed by the testimony of experts in early Federal cases concerning the conditions of confinement in New York City facilities. Dr. Karl Menninger testified as follows:

"[T]he one great thing that...[the detainee] can look forward to is the reestablishment, contact, with this world. . . . These have all been broken for this man. Now, this makes for a dangerous state of instability, because without these contacts he can't live psychologically. All this is interposed into this establishment of this contact, a pane of dirty glass and a dim --

in my experience often a
nonfunctional, nonfunctioning
telephone. . . .

Rhem v. Malcolm, supra, 371 F. Supp at
602. Dr. Augustus Kinzel, former staff
psychiatrist at the U.S. Medical Center
at Springfield, Missouri, pictured
non-contact visiting as frustrating,
". . . the carrot on the stick that is
held in front of the person who can't
quite attain it." Id. at 603. The
Department's Director of Mental Health,
testifying in the same litigation, "told
of psychological damage to a prisoner who
returned from booth visits 'even worse
than when he went down because of the
separation'." Id. at 603.

The Board was also mindful of
the importance of visitation in main-
taining emotional stability, particularly
among younger detainees. In a study

published subsequent to promulgation of its standards, the Board reported that over twenty-five per cent of suicides in the jails were by young men who had not received a visit.¹¹ It was clear to the Board that the conditions of booth visits served to deter friends and family from providing the frequent contacts so important to the emotional stability of detainee population.

In the hearing process, representatives of the families of inmates gave further evidence of the alienating effects of booth visitation:

The physical presence is most important, to both adults and children. To see facial

¹¹ NEW YORK CITY BOARD OF CORRECTION, STUDY OF SUICIDES: 1978 - 83 11-12 (1983).

expressions, to touch hands, to sit a child on one's lap can do so much to break down barriers to communication. It can ease the tensions on both sides and relieve all from the vague imaginings that so subtly sneak into a person's mind when distance forbids actual touch and sight.¹²

Experts in child development stress the positive role that regular visitation can play in maintaining the family bonds so important to healthy emotional development of a child. They have concluded that institutional rules that severely limit the duration, frequency and circumstances of visitation are not in the child's best interest.

¹² Submission to the New York City of Board of Correction by Prison Families Anonymous, Inc., June, 1977.

Visitation at least weekly in surroundings that permit normal interaction and physical contact is recommended. On Prisons and Parenting: Preserving the Tie that Binds, 87 YALE L.J. 1408, 1416 - 25 (1978).

In consultation with the Department, the Mayor and City budget officers, the Board weighed these factors against public safety and fiscal concerns. Its deliberations were informed by reports of the successes and problems involved in compliance with preexisting court orders requiring limited contact visits.¹³

¹³ The earliest court-ordered contact visiting sometimes took place in makeshift, temporary facilities under less than ideal circumstances. See testimony of former New York City Warden Gaston at the trial of this case, RT
(Footnote cont'd)

The Board concluded that the additional stigma and stress associated with booth visitation could not be justified by security or fiscal concerns in the case of all pretrial detainees and short term sentenced inmates. The Board also concluded that it was essential that the Department be permitted to deny barrier free visitation in cases in which it determined that open visitation would

(Footnote cont'd)
(11/8/78) 4284-4372. The Board resolved not to implement its contact visitation standard until adequate resources and facilities were available. Id. at 4365. Moreover, the overall record established during the early period of limited, contact visitation did not justify its prohibition. The warden who administered one of the earliest large-scale contact visitation programs in New York City testified as follows in hearings before the Board:

I think...[contact visits are] much better. I've seen this with the contact visits. When I walk into the booth visit, which is a
(Footnote cont'd)

(Footnote cont'd)

closed visit, I always am greeted with a high degree of complaints and general unhappiness. I go into the contact visit room, inmates are waiting unpleasantly long times but yet not complaining. One thing that I like is to see a child come in and the father be able to look at his own child in an open setting.

I like to do things right. I like to stick with the basics. I think that the contact visits was a demonstration of that. We were given enough time and we were given a reasonable amount of detail and assistance, manpower and we were able to bring about a very satisfactory temporary arrangement.

Preliminary Hearing on Minimum Standards, 1976: Hearing Before the New York City Board of Correction (June 21, 1976) (testimony of Warden Louis Grecco Transcript 57-58).

Similarly, the Correction Officers' Benevolent Association, while urging the overriding importance of safety and security in New York City jails, publicly stated its support of contact visitation.

Minimum Standards Subcommittee, 1977: Hearing Before the New York City Board of Correction (June 30, 1977) (statement of the Correction Officers' Benevolent Association, Transcript 206).

constitute a threat to the safety or security of the institution.¹⁴

B. Extensive Experience with Contact Visitation Programs in New York City Suggests No Justification for Their Outright Denial to Detainee Populations.

The Board and its staff have closely monitored the implementation of the minimum standard regarding barrier free visitation. Hundreds of thousands of contact visits have been conducted yearly in New York City jails pursuant to the Board standard. The number of such visits has more than doubled since promulgation of the standard in 1978.

¹⁴ See New York City Board of Correction, Minimum Standards for New York City Correctional Facilities, Section 10 - Visiting (1978), reproduced in full as Appendix E of this brief. In particular, see Sections 10.1, 10.4, 10.6, 10.8.

The Board has observed that the desire to avoid booth visits is so strong that few inmates or visitors would willingly risk the penalty of cancellation of barrier free visits by violating institutional rules and regulations with respect to visits. Thus, visiting room confrontations, incidents and misconduct are rare. Review of all Unusual Incident Reports relating to visiting in Fiscal Year 1983 reveals that 99.95% of the visits were conducted without incident.

Although the Board has received requests from the Department to be relieved of obligations imposed by other minimum standards, it has never received a request for a substantive variance from its contact visitation standard. Contact visiting was initially vigorously opposed

in litigation in the early seventies,¹⁵ but it was accepted in concept by the Department in the late seventies when Board standards were being debated. Today, contact visiting has been incorporated into Department operations system wide. With the opening of a new contact visiting area in the detention ward at Bellevue Hospital this spring, all Department facilities will routinely provide contact visits. Barrier free visiting will also be standard visit practice in all new facilities to be constructed under the Mayor's recently

¹⁵ The Department originally opposed contact visiting because, like the jail administrators in Los Angeles, it feared an increase in escapes, contraband, and hostage-taking as well as changes in physical plant, staffing and procedures. See Rhem v. Malcolm, supra 371 F. Supp. at 604-606 for discussion of Department objections.

announced plan to add over 3,000 new beds to the New York City system by 1986. While all Department facilities retain some non-contact visiting booths, these booths are rarely utilized.¹⁶

Although it is impossible to account for the many variables which might be related to increases and decreases in the number of escapes from correction facilities, it is worth noting that the number of escapes has decreased since the introduction of contact visiting. This fact is more notable in view of the substantial increase in the

¹⁶ In the first six months of Fiscal Year 1984, only 1.3% of all visits in the New York City correctional system were booth visits. Excluding visits which were conducted in hospital wards which did not have barrier free visitation facilities throughout the period in question reduces the percentage of booth visits to one half of one per cent.

inmate population during the same period.¹⁷ Similarly, while contraband remains a problem in New York City's (and in most) jails, it enters through many sources. The use of magnetometers, careful pre and post visit search procedures, personal property lockers for visitors and visit uniforms for inmates have proved effective in controlling the flow of dangerous contraband into the jails.

The Board does not assert that New York City's approach to barrier free visitation should be universally adopted. It recognizes that each jail is different and that differences in staffing, physical plant and inmate population must be taken into account in the development

¹⁷ See chart next page.

Population, Contact Visits and Escapes New York City
Department of Correction 1978 - 1983

<u>Fiscal Year</u>	<u>Average Daily Population</u>	<u>Number of Contact Visits</u>	<u>Number of Escapes Attempted/Successful</u>	
1978	6993	159,960	73	22
1979	6749	215,400	27	7
1980	7033	266,500	22	7
1981	8541	324,456	9	9
1982	9279	310,935	16	15*
1983	9948	338,972	5	4

*Includes 9 inmates who escaped from the Court Holding Area
in one incident.

of programs and procedures. However, five years of successful experience with barrier free visitation in a large metropolitan area with thousands of inmates housed in both modern and antiquated facilities strongly suggests that, in the case of inmates who have been convicted of no crime, any absolute prohibition of barrier free visitation -- regardless of the nature of the charges, the amount of bail set, the inmate's security classification or the length of confinement -- is simply unsupportable.

It is important that local officials not be burdened by unwarranted interference concerning security designations which affect eligibility for contact visits and appropriate security and administrative measures concerning the implementation of barrier free visitation. These concerns are the

province of local government. The order of the district court below, as we understand it, has not trampled upon these important local prerogatives. It has simply assured that pretrial confinement will not unnecessarily entail punitive, stigmatizing restraints which are potentially disruptive of emotional stability and family bonds.

CONCLUSION

The judgment of the Court of Appeals should be affirmed insofar as it upholds the requirement that the Sheriff of Los Angeles County permit contact visits for some pretrial detainees at the Los Angeles County Central Jail.

Respectfully submitted,

PEGGY C. DAVIS

New York University
School of Law
40 Washington Square South
New York, New York 10012
[212] 598-2713

Counsel of Record for
Amicus Curiae

BARBARA E. DUNKEL

New York City Board of
Correction
51 Chambers Street
New York, New York 10007
[212] 964-6307

Of Counsel



Visit booths in old Manhattan House of Detention (Tombs)

Appendix A



One of two visit booths in newly renovated
Manhattan House of Detention.

Appendix B



Contact visiting in new Manhattan House of Detention.

Appendix C



Barrier free visits in House of Detention for Men on Rikers Island.

Appendix D

APPENDIX E

Part 10 - Visiting

Section

- 10.1 Policy**
- 10.2 Visiting and Waiting Areas**
- 10.3 Visiting Schedule**
- 10.4 Initial Visit**
- 10.5 Visitor Identification
and Registration**
- 10.6 Contact Visits**
- 10.7 Visiting Security and
Supervision**
- 10.8 Limiting of Visiting
Rights**
- 10.9 Effective Date**

Section 10.1 Policy

Prisoners are entitled to receive personal visits of sufficient length and number.

Section 10.2 Visiting and Waiting Areas

(a) By September 1, 1978, a visiting area of sufficient size to meet the requirements of this Part shall be established and maintained in each institution.

(b) The visiting area shall be designed so as to allow physical contact between prisoners and their visitors as required by Section 10.6.

(c) The Department shall make every effort to minimize the waiting time prior to a visit. Visitors shall not be required to wait outside an institution unless adequate shelter is provided and the requirements of Section 10.2(d) are met.

(d) All waiting and visiting areas shall provide for at least minimal comforts for visitors, including but not limited to:

(i) sufficient seats for all visitors;

(ii) access to bathroom facilities and drinking water throughout the waiting and visiting periods.

(iii) by September 1, 1978, access to vending machines for beverages and foodstuffs at some point during the waiting or visiting period; and

(iv) access to a Spanish-speaking employee or volunteer at some point during the waiting or visiting period. All visiting rules, regulations and hours shall be clearly posted in English and Spanish in the waiting and visiting areas at each institution.

e. The Department shall make every effort to utilize outdoor areas for visits during the warm weather months.

Section 10.3 Visiting Schedule

(a) Visiting hours may be varied to fit the schedules of individual institutions but must meet the following minimum requirements for detainees:

(i) Monday through Friday.
Visiting shall be permitted on at least three days for at least five consecutive hours between 9 a.m. and 5 p.m. Visiting shall be permitted on at least two evenings for at least three consecutive hours between 6 p.m. and 10 p.m.

(ii) Saturday and Sunday.
Visiting shall be permitted on both days for at least five consecutive hours between 9 a.m. and 8 p.m.

(b) Visiting hours may be varied to fit the schedules of individual institutions but must meet the following minimum requirements for sentenced prisoners:

(i) Monday through Friday.
Visiting shall be permitted on at least one evening for at least three consecutive hours between 6 p.m. and 10 p.m.

(ii) Saturday and Sunday.
Visiting shall be permitted on both days for at least five consecutive hours between 9 a.m. and 8 p.m.

(c) The visiting schedule of each institution shall be available by contacting either the central office of the Department or the institution.

(d) Visits shall last at least one hour. This time period shall not begin until the prisoner and visitor meet in the visiting room.

(e) Prisoners are entitled to at least two visits per week with at least one on an evening or the weekend, as the prisoner wishes. By September 1, 1978, detainees shall be entitled to at least three visits per week with at least one on an evening or the weekend, as the detainee wishes. Visits by properly identified persons providing services or assistance, including lawyers, doctors, religious advisors, public officials, therapists, counselors and media representatives, shall not count against this number.

(f) There shall be no limit to the number of visits by a particular visitor or category of visitors.

(g) In addition to the minimum number of visits required by subdivisions (a) (b) and (e) of this Section, additional visitation shall be provided in cases involving special necessity, including but not limited to, emergency situations and situations involving lengthy travel time.

(h) Prisoners shall be permitted to visit with at least three visitors at the same time, with the maximum number to be determined by the institution.

(i) Visitors shall be permitted to visit with at least two prisoners at the same time, with the maximum number to be determined by the institution.

(j) If necessitated by lack of space, an institution may limit the total number of persons in any group of visitors and prisoners to four. Such a limitation shall be waived in cases involving special necessity, including but not limited to, emergency situations and situations involving lengthy travel time.

Section 10.4 Initial Visit

(a) Each detainee shall be entitled to receive a visit within 24 hours after his or her admission to the institution.

(b) If a visiting period scheduled pursuant to Section 10.3(a) is not available within 24 hours after a detainee's admission, arrangements shall be made to ensure that the initial visit required by this Section is made available.

Section 10.5 Visitor Identification and Registration

(a) Consistent with the requirements of this Section, any properly identified person shall, with the prisoner's consent, be permitted to visit the prisoner.

(i) Prior to a visit, a prisoner shall be informed of the identity of the prospective visitor.

(ii) A refusal by a prisoner to meet with a particular visitor shall not affect the prisoner's right to meet with any other visitor during that period, nor the prisoner's right to meet with the refused visitor during subsequent periods.

(b) Each visitor shall be required to enter in the institution visitors log:

- (i) his or her name;
- (ii) his or her address;
- (iii) the date;
- (iv) the time of entry;

(v) the name of the prisoner or prisoners to be visited; and

(vi) the time of exit.

(c) Any prospective visitor who is under 16 years of age shall be required to enter, or have entered for him or her, in the institution visitors log;

(i) the information required in subdivision (b) of this Section;

(ii) his or her age; and

(iii) the name, address, and telephone number of his or her parent or legal guardian.

(d) The visitors log shall be confidential and information contained therein shall not be read by or revealed to non-Department staff except as provided by the City Charter or pursuant to a specific request by a legitimate law enforcement agency. The Department shall maintain a record of all such requests with detailed and complete descriptions.

(e) Prior to visiting a prisoner, a prospective visitor under 16 years of age may be required to be accompanied by a person 18 years of age or older, and to produce oral or written permission from a parent or legal guardian approving such visit.

(f) The Department may adopt alternative procedures for visiting by persons under 16 years of age. Such procedures must be consistent with the policy of Section 10(e), and shall be submitted to the Board for approval.

Section 10.6 Contact Visits

Physical contact shall be permitted between every prisoner and all of his or her visitors throughout the visiting period, including holding hands, holding young children, and kissing.

Section 10.7 Visiting Security and Supervision

(a) All prisoners, prior and subsequent to each visit, may be searched solely to ensure that they possess no contraband.

(b) All prospective visitors may be searched prior to a visit solely to ensure that they possess no contraband.

(c) Any body search of a prospective visitor made pursuant to subdivision (b) of this Section shall be conducted only through the use of electronic detection devices. Nothing contained herein shall affect any authority possessed by correctional personnel pursuant to statute.

(d) Objects possessed by a prospective visitor, including but not limited to, handbags or packages, may be

searched or checked. Personal effects, including wedding rings and religious medals and clothing, may be worn by visitors during a visit.

(e) Supervision shall be provided during visits solely to ensure that the safety or security of the institution is maintained.

(f) Visits shall not be listened to or monitored unless a lawful warrant is obtained, although visual supervision should be maintained.

Section 10.8 Limitation of Visiting Rights

(a) Visiting rights shall not be denied, revoked, limited or interfered with based upon prisoner's or prospective visitor's:

- (i) sex;
- (ii) sexual orientation;
- (iii) race;
- (iv) age, except as otherwise provided in this Part;
- (v) nationality
- (vi) political beliefs;
- (vii) religion
- (viii) criminal record;

(ix) pending criminal or civil case; or

(x) lack of family relationship.

(b) The visiting rights of a prisoner with a particular visitor may be denied, revoked or limited only when it is determined that the exercise of those rights constitutes a serious threat to the safety or security of an institution, provided that visiting rights with a particular visitor may be denied only if revoking the right to contact visits would not suffice to reduce the serious threat.

(i) This determination must be based on specific acts committed by the visitor during a prior visit to an institution that demonstrate his or her threat to the safety and security of an institution, or on specific information received and verified that the visitor plans to engage in acts during the next visit that will be a threat to the safety or security of the institution. Prior to any determination, the visitor must be provided with written notification of the specific charges and the names and statements of the charging parties and be afforded an opportunity to respond. The name of an informant may be withheld if necessary to protect his or her safety.

(c) A prisoner's right to contact visits as provided in Section 10.6 of this Part may be denied, revoked, or

limited only when it is determined that such visits constitute a serious threat to the safety or security of an institution. Should a determination be made to deny, revoke or limit a prisoner's right to contact visits in the usual manner, alternative arrangements for affording the prisoner the requisite number of visits shall be made, including, but not limited to, non-contact visits.

(i) This determination must be based on specific acts committed by the prisoner while in custody under the present charge or sentence that demonstrate his or her threat to the safety and security of an institution, or on specific information received and verified that the prisoner plans to engage in acts during the next visit that will be a threat to the safety or security of the institution. Prior to any determination, the prisoner must be provided with written notification of the specific charges and the names and statements of the charging parties and be afforded an opportunity to respond. The name of an informant may be withheld if necessary to protect his or her safety.

(d) Any determination to deny, revoke or limit a prisoner's visiting rights pursuant to subdivisions (b) and (c) of this Section shall be in writing and shall state the specific facts and reasons underlying such determination. A copy of this determination, including the appeal procedure, shall be sent to the

Board and to any person affected by the determination within 24 hours of the determination.

(e) Any person affected by a determination made pursuant to subdivisions (b) and (c) this Section may appeal such determination to the Board.

(i) The person affected by the determination shall give notice in writing to the Board and to the Department of his or her intent to appeal the determination.

(ii) The Department and any person affected by the determination may submit to the Board for its consideration any relevant material in addition to the written determination.

(iii) The Board or its designate shall issue a written decision upon the appeal within five business days after it has received notice of the requested review.

Section 10.9 Effective Date

This Part shall take effect May 1, 1978.

SHERMAN BLOCK, et al.,

Petitioners

v.

DENNIS RUTHERFORD, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Peggy C. Davis, counsel for amicus curiae Board of Correction of the City of New York, hereby certify that copies of the within Motion for Leave to File a Brief Amicus Curiae and Brief Amicus Curiae in behalf of Respondent were mailed this day, postage prepaid, to counsel for each party to the proceeding and to the Solicitor General of the United States as amicus curiae in behalf of Petitioner, as follows:

FREDERICK R. BENNETT

Principal Deputy County Counsel
Office of the Los Angeles
County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

Counsel for Petitioners

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530

Amicus Curiae in behalf of
Petitioners

ALVIN J. BRONSTEIN
The National Prison Project
1346 Connecticut Ave., NW
Washington, D.C. 20036

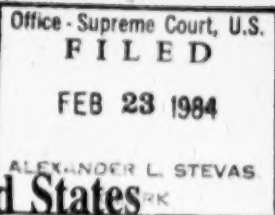
FRED OKRAND
ACLU Foundation of Southern
California
633 South Shatto Place
Los Angeles, California 90005

Counsel for Respondents

Dated: February 14, 1984

PEGGY C. DAVIS

New York University
School of Law
40 Washington Square
South
New York, New York
10012
[212] 598-2713



No. 83-0317
IN THE
Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK, *et al.*,

Petitioners,

vs.

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

**PETITIONERS' OPPOSITION TO MOTION OF
THE NEW YORK CITY BOARD OF
CORRECTIONS TO FILE BRIEF
OF AMICUS CURIAE.**

FREDERICK R. BENNETT,
Principal Deputy County Counsel,
Office of the Los Angeles
County Counsel,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1880,

Counsel for Petitioners.

Petition for Certiorari filed August 23, 1983.
Certiorari granted November 7, 1983.

TABLE OF CONTENTS

	Page
Petitioners' Opposition to Motion of the New York City Board of Corrections to File Brief of Amicus Curiae	1
The Proposed Brief Amicus Curiae Presents Only Factual Evidence, Which Is in Direct Conflict With the Record in This Case, and Which May Mislead the Court Because of the Infeasibility of Resolving the Factual Disputes Before This Court	1
Appendix. Letter, Frederick R. Bennett to Barbara Dunkel, Dated January 27, 1984	App. p. 1

No. 83-0317

IN THE

Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK, *et al.*,

Petitioners,

vs.

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR,

Respondents.

PETITIONERS' OPPOSITION TO MOTION OF THE NEW YORK CITY BOARD OF CORRECTIONS TO FILE BRIEF OF AMICUS CURIAE.

The Proposed Brief Amicus Curiae Presents Only Factual Evidence, Which Is in Direct Conflict With the Record in This Case, and Which May Mislead the Court Because of the Infeasibility of Resolving the Factual Disputes Before This Court.

On January 27, 1984, Petitioners, by letter, a copy of which is set forth in the appendix hereto, denied requested permission to the New York City Board of Corrections to file a brief amicus curiae for the reasons set forth in that letter.

The proffered brief states that it "will not review the legal issues". (Amicus Brief, p. 4) Rather, it seeks through factual assertions and pictures to present evidence to the Court concerning experience at New York City jails with contact

visitation. The evidence sought to be introduced is in direct conflict with extensive testimony of the Warden of the largest New York City jail, which is set forth in the record of this case. (RT 20:4281-4371) As indicated in the letter set forth in the appendix, the proffered evidence is also in conflict with a recent investigation involving interviews with current and former administrators of New York City jails. The evidentiary conflict likely flows from the fact that the information is provided by an appointive agency which inspects city jails and promulgates standards, but does not operate jail facilities. (Brief Amicus Curiae, p. 1)

Petitioners' concern is that the court will be misled and that there is little opportunity to refute the factual assertions made, which are inconsistent with specific testimony in the record.

Respectfully submitted,
FREDERICK R. BENNETT,
Principal Deputy County Counsel,
Counsel for Petitioners.

APPENDIX.

Office of the County Counsel
648 Hall of Administration
Los Angeles, California 90012

January 27, 1984

974-1830

Barbara Dunkel
Board of Corrections
City of New York
51 Chambers Street
New York, New York 10007

Re: *Block v. Rutherford*
No. 83-0317

Dear Ms. Dunkel:

Since my first discussions with you, I have caused a preliminary investigation of the contact visitation practices in certain New York detention facilities to be conducted, including discussions with current and recently retired-administrators. This investigation suggests significant problems with contact visitation similar to the concerns of the Sheriff of Los Angeles County.

This investigation has caused me some concern that your amicus brief may attempt to place before the court facts concerning contact visitation which, in a trial setting, could be reasonably disputed. This is consistent with the record in the present case which contains testimony from an administrator of a New York facility. As appropriate litigation of such facts is not feasible before the Supreme Court, I have serious concerns that your amicus brief may mislead the court. Given the extension of time to file a brief which has been obtained by the respondents, and the dates the court has suggested will be likely for oral arguments, I

believe their will be insufficient time to meet such evidence through amicus briefs from other parties.

As a consequence, I have reconsidered your request to file an amicus brief, and now object to your participation. If you have information that demonstrates my concerns are unfounded, I will, of course, reconsider my position further.

Very truly yours,

DE WITT W. CLINTON

County Counsel

By /s/ Frederick R. Bennett

FREDERICK R. BENNETT

Principal Deputy County Counsel

FRB:srm

cc: Fred Okrand, ACLU

No. 83-317

DEC 23 1983

ALEXANDER L. STEVENS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

SHERMAN BLOCK, SHERIFF OF THE COUNTY OF
LOS ANGELES, ET AL., PETITIONERS

v.

DENNIS RUTHERFORD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

REX E. LEE

Solicitor General

WM. BRADFORD REYNOLDS

Assistant Attorney General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court failed to comply with *Bell v. Wolfish*, 441 U.S. 520 (1979), in requiring petitioners to permit contact visits for low risk pre-trial detainees incarcerated more than 30 days at the Los Angeles County Central Jail.

2. Whether the district court erred in holding that pretrial detainees at the Los Angeles County Central Jail are constitutionally entitled to be present during general searches of their cells.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	4
Argument:	
I. Petitioners' ban on contact visits for pretrial detainees is a constitutionally permissible exercise of discretion to assure institutional security.....	5
II. The district court erred in holding that pretrial detainees have a constitutional right to be present during general searches of their cells	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

<i>Bell v. Wolfish</i> , 441 U.S. 520	<i>passim</i>
<i>Inmates of Allegheny County Jail v. Pierce</i> , 612 F.2d 754	6
<i>Jones v. Diamond</i> , 636 F.2d 1364, cert. granted <i>sub nom. Ledbetter v. Jones</i> , 452 U.S. 959, cert. dismissed, 453 U.S. 950	5
<i>Jones v. North Carolina Prisoner's Labor Union</i> , 433 U.S. 119	8, 11
<i>Jordan v. Wolke</i> , 615 F.2d 749	5
<i>Pell v. Procunier</i> , 417 U.S. 817	7, 8, 11
<i>Procunier v. Martinez</i> , 416 U.S. 396	8, 11
<i>Ramos v. Lamm</i> , 639 F.2d 559	5
<i>United States ex rel. Wolfish v. Levi</i> , 439 F. Supp. 114	12
<i>West v. Infante</i> , 707 F.2d 58	5

IV

Constitution and statutes :	Page
U.S. Const. :	
Amend. IV	4, 11, 12
Amend. V (Due Process Clause)	4, 6, 7, 12
Civil Rights of Institutionalized Persons, 42 U.S.C.	
(Supp. V) 1997 <i>et seq.</i>	2
42 U.S.C. (Supp. V) 1983	2
42 U.S.C. (Supp. V) 1985	2
Miscellaneous :	
Department of Justice, <i>Federal Standards for Prisons and Jails</i> (1980)	5

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-317

SHERMAN BLOCK, SHERIFF OF THE COUNTY OF
LOS ANGELES, ET AL., PETITIONERS

v.

DENNIS RUTHERFORD, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE**

INTEREST OF THE UNITED STATES

This case involves a constitutional challenge to two practices of the Los Angeles County Central Jail: denying contact visits to pretrial detainees and refusing to allow pretrial detainees to be present during searches of their cells. The Bureau of Prisons administers 43 correctional institutions, of which nine house persons detained pending trial on federal charges. Any decision by this Court concerning the constitutional rights of pretrial detainees in state facilities will necessarily have implications for federal pretrial detainees. In addition, the United States

has enforcement responsibilities under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. (Supp. V) 1997 *et seq.*, to assure that state prison officials do not deprive inmates of the rights, privileges or immunities secured or protected by the Constitution and laws of the United States.

STATEMENT

In 1975, pretrial detainees at the Los Angeles County Central Jail brought a class action under 42 U.S.C. (Supp. V) 1983 and 1985 challenging the conditions of their confinement (Pet. App. 1). The district court entered judgment for the plaintiffs. The county implemented nine of the changes ordered by the district court, and appealed the remaining three—including the court's requirement that the jail allow contact visits for pretrial detainees identified as low risks who have been incarcerated more than 30 days, and its requirement that the jail permit inmates to be present during general searches of their cells (*id.* at 1-2).

In an unpublished memorandum decision, the Ninth Circuit remanded the case for the district court's reconsideration in light of this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979) (Pet. App. 1-2). On remand, the district court reaffirmed its previous order as to the three challenged conditions (*id.* at 23-28). The county again appealed, and on July 14, 1983, the Ninth Circuit affirmed the district court on the contact visit and cell search issues (with one judge dissenting on the latter question), and reversed on the third issue (reinstallation of transparent windows in the cells) (*id.* at 1-17).

The Los Angeles County Central Jail is a 5,000 inmate facility used primarily to house men awaiting trial on criminal charges (Pet. 2). The jail's visiting

facilities consist of 228 separate cubicles where inmates and visitors are separated by a sheet of glass and use telephones to speak to each other (Pet. App. 49-50). Visits are limited to twenty minutes, and the jail accommodates 63,000 visitors per month (*id.* at 50). Petitioners have categorically rejected any proposal to alter this arrangement to permit contact visits, even on a limited basis, because they claim it would compromise the security of the institution (*id.* at 26).

The district court concluded that the jail's absolute ban on contact visits is an overreaction to security risks (Pet. App. 26), and it ordered petitioners to make one weekly contact visit available to each pre-trial detainee in custody for one month or more "concerning whom there is no indication of drug or escape propensities" (*id.* at 23). The court further provided that the jail could limit the total number of such visits to 1,500 per week (*ibid.*).¹

In affirming this aspect of the district court's order, the Ninth Circuit recognized that, while contact visitation is not constitutionally mandated for all detainees in all facilities, "[a] blanket restriction on contact visits for all detainees may present an unreasonable, exaggerated response to security concerns at a particular facility" (Pet. App. 8). The court of appeals concluded that petitioners' refusal to allow contact visits was an exaggerated response to security concerns, and held that the district court had properly accommodated "institutional needs and objectives and the provisions of the constitution that are

¹ The district court did not explain how it arrived at the 1,500 visit ceiling. The total number of visitors at the jail each week is 15,000 (Pet. App. 6 n.3).

of general application' " (*id.* at 6 (quoting *Wolfish*, 441 U.S. at 546)).

With one judge dissenting (Pet. App. 15-17), the Ninth Circuit also affirmed the district court's order requiring the petitioners to allow inmates to observe general searches of their cells (*id.* at 8-12). The Ninth Circuit distinguished this Court's rejection of the identical constitutional claim in *Wolfish* by noting that the district court here took account of security concerns ignored by the lower courts in *Wolfish* (*id.* at 10), and by reasoning that the district court here premised its relief on due process concerns (preventing improper confiscation of an inmate's property) rather than on the Fourth Amendment grounds rejected as insufficient in *Wolfish* (*id.* at 11-12).

SUMMARY OF ARGUMENT

This case presents two questions concerning the proper application of the standards recently articulated by this Court in *Wolfish* for evaluating the constitutional claims made by pretrial detainees challenging their conditions of confinement. On the first question, the Ninth Circuit correctly recognized that contact visitation is not constitutionally mandated for all detainees in all facilities (Pet. App. 8), but we believe that in affirming the district court's requirement of a limited number of contact visits for Los Angeles County Central Jail inmates, the court of appeals failed to accord to the security-related judgment of corrections officials the deference required by *Wolfish*.

The Ninth Circuit's resolution of the second issue—the right of an inmate to be present during a cell search—is squarely at odds with *Wolfish*'s holding to the contrary on virtually identical facts. Accordingly, we support petitioners in urging this Court to reverse.

ARGUMENT

I. PETITIONERS' BAN ON CONTACT VISITS FOR PRETRIAL DETAINEES IS A CONSTITUTIONALLY PERMISSIBLE EXERCISE OF DISCRETION TO ASSURE INSTITUTIONAL SECURITY

In our view, the question presented here is not the desirability of contact visits generally, nor whether allowing such visits is more "reasonable" than a contrary policy.² Rather, the question is whether weekly contact visits are constitutionally mandated.³

² The Federal Bureau of Prisons permits unlimited attorney/client contact visits and generally allows supervised social contact visitation throughout its institutions for both convicted persons and pretrial detainees, with the exception of its facility at Marion, Illinois, where the Bureau has terminated social contact visits for all inmates in response to two recent murders of staff. In addition, the *Federal Standards for Prisons and Jails* promulgated by the Department of Justice in 1980 provide (§ 12.12, at 113):

Visiting facilities [should] allow for physical contact between inmates and the visitors of their choice except in those specific instances where there is a reasonable belief that such a procedure would jeopardize the safety or security of the facility.

³ The courts of appeals appear to be split on the question whether there can ever be a case where the refusal to accord contact visitation to a pretrial detainee amounts to a constitutional violation. See, e.g., *West v. Infante*, 707 F.2d 58 (2d Cir. 1983) (trial court erred in dismissing for failure to state a claim where pretrial detainee alleged unconstitutional denial of contact visits); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir.), cert. granted *sub nom. Ledbetter v. Jones*, 452 U.S. 959, cert. dismissed, 453 U.S. 950 (1981) (incarcerated persons awaiting trial may, in some circumstances, be constitutionally entitled to contact visits); *Ramos v. Lamm*, 639 F.2d 559, 580 (10th Cir. 1980) (unlimited contact visits not required where limited contact visits were provided); *Jordan v. Wolke*, 615 F.2d 749, 751, 753-754 (7th Cir. 1980) (refusal to grant con-

In *Wolfish* this Court held that, under the Due Process Clause, unconvicted pretrial detainees may not be subjected to punishment or to conditions of confinement that amount to punishment.⁴ Whether a particular restriction on pretrial detainees withstands constitutional scrutiny, therefore, depends upon whether that restriction is imposed "for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose" (441 U.S. at 538).

contact visits upheld where 95% of inmates are detained fewer than 30 days and contact visitation would require construction of new facilities and hiring additional guards); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 758-760 (3d Cir. 1979) (denial of contact visits upheld where costly and extensive security measures would be necessary if they were permitted).

Because of the Federal Bureau of Prisons' policy allowing contact visits, we did not challenge the Second Circuit's holding in *Wolfish* that pretrial detainees have a constitutional right to contact visits. 441 U.S. at 560 n.40. In upholding the federal practice of strip searching detainees following contact visits, however, this Court suggested that any constitutional infirmity in the strip search procedure could be eliminated by "abolish[ing] contact visits altogether." 441 U.S. at 558-560 & n.40.

⁴ As the Court explained (441 U.S. at 535-537):

In evaluating the constitutionality of conditions or restrictions of pretrial detention * * * we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law * * *. [T]he Government * * * may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment * * *.

This Court plainly indicated that the federal judiciary is not to apply a strict or heightened scrutiny analysis in making the above determination. "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate [nonpunitive] governmental objective," such as institutional security, "it does not, without more, amount to 'punishment'" (441 U.S. at 539). And, "in the absence of a showing of intent to punish," a court "permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees" only where the restriction "is arbitrary or purposeless" or lacks "a legitimate nonpunitive government objective" (*id.* at 539 & n.20).

Petitioners maintain that the need to safeguard the security of Los Angeles County Central Jail requires a complete ban on contact visits for all inmates. Respondents assert that such a policy infringes upon rights secured by the Due Process Clause.⁸ Thus, the task of the courts below was to determine whether a ban on contact visits is "reasonably related" to the goal of maintaining jail security. *Wolfish*, 441 U.S. at 540-41 n.23 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)). This Court has repeatedly cautioned that "[i]n determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that '[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence

⁸ Respondents have not, to the government's knowledge, suggested an alternative constitutional source for their claimed right to contact visitation.

of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.' " *Wolfish*, 441 U.S. at 540-541 n.23 (quoting *Pell v. Procunier*, 417 U.S. at 827). Federal courts, in short, are obligated to give "wide deference" to the expert judgment of corrections officials (441 U.S. at 547) unless they are " 'conclusively shown to be wrong' " (441 U.S. at 555, quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 132 (1977)).

Petitioners contend, and we agree, that the court below failed to accord the appropriate deference to petitioners' judgment concerning jail security. The visitation policy adopted by state officials in this case is not arbitrary or purposeless; there is no substantial evidence in the record to indicate that the policy is an exaggerated response to security concerns. *Bell v. Wolfish*, therefore, requires reversal.

The prohibition on contact visits that is at issue here serves several legitimate, non-punitive objectives. The prohibition, of course, is primarily designed to further "the central objective of prison administration, safeguarding institutional security." *Wolfish*, 441 U.S. at 547. See also *Jones v. North Carolina Prisoner's Labor Union*, 433 U.S. 119, 132 (1977); *Pell v. Procunier*, 417 U.S. at 822; *Procunier v. Martinez*, 416 U.S. 396, 412-414 (1974). The district court properly recognized that the proscription frees jail personnel from the "complicated, expensive and time consuming process" of constantly monitoring inmates and their visitors (Pet. App. 31). The policy also obviates the necessity of intrusive security measures, such as the strip and body cavity searches of detainees that the district court found would be a

necessary incident of contact visits (*ibid.*). Moreover, a change in policy would require the construction of a "large and secure visiting area" (*id.* at 31), although the district court theorized that "[m]odest alteration within the jail presumably could provide appropriate space" for a limited number of contact visits (*id.* at 33). Finally, and most importantly, the district court noted that petitioners' ban on contact visits prevents a number of serious security problems—including "the importation of narcotics * * *, the increased possibility of the introduction of weapons and * * * escape attempts with the taking of hostages" (*id.* at 31-32)—that cannot be alleviated "despite all safeguards and precautions" (*id.* at 31).⁶

As the above findings of the district court illustrate, the prohibition of contact visitations in this case is hardly "arbitrary or purposeless," but is rather a "reasonable response * * * to legitimate security concerns." *Wolfish*, 441 U.S. at 561. Nevertheless, despite its acknowledgement that "many factors strongly militate against the allowing of contact visits" (Pet. App. 32), the district court held that petitioners' ban on such visits is constitutionally impermissible. It did so solely because its own perception of "[w]hat is reasonable under the circumstances" (Pet. App. 25) led it to conclude that the

⁶ Obviously, restricting contact visits to "low security risk" detainees, as ordered by the courts below, does not eliminate the possibility that those persons could be enlisted, voluntarily or involuntarily, to secure weapons, narcotics, or other contraband for higher risk fellow detainees. Moreover, the Bureau of Prisons does not classify pre-trial detainees according to risk, largely because such a task is unfeasible prior to the preparation of a pre-sentence report. There is, therefore no reason to believe that state officials could even segregate "low risk" detainees, as assumed by the lower courts here.

security problems created by contact visits would not be "intolerable" (*id.* at 26) if such visits were limited to "low security risk" detainees who had been incarcerated for more than 30 days (*ibid.*).

This analysis, approved by the court of appeals, clearly misapplies the standard mandated in *Wolfish*. The district court's determination (Pet. App. 32) that "many factors strongly militate against the allowing of contact visits" should have ended its inquiry. Such a finding demonstrates that the jail administrators' ban on contact visits is reasonably related to legitimate objectives and thus is constitutionally permissible. Corrections officials are not obligated under the Due Process Clause to pursue their security objectives in the least restrictive manner. *Wolfish*, 441 U.S. at 542-43 n.25, 554, 559-560 n.40. Courts simply may not substitute their judgment for that of expert corrections officials because, in their view, security problems can be adequately mitigated through less intrusive procedures. 441 U.S. at 546-547, 557, n.38. "[P]roper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the * * * rights of the detainees." 441 U.S. at 557, n.38.

Unless the actions of corrections officials are shown to be arbitrary or irrational, the balancing of institutional security concerns and detainee rights that was undertaken by the lower courts in this case (Pet. App. 6, 26) is to be left within the discretion of corrections officials. As in *Wolfish*, 441 U.S. at 554, the lower courts in this case:

have trenched too cavalierly into areas that are properly the concern of [corrections] officials. It

is plain from their opinions that the lower courts simply disagreed with the judgment of [the corrections] officials about the extent of the security interests affected and the means required to further those interests. But our decisions have time and again emphasized that this sort of unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this is not appropriate. See *Jones v. North Carolina Prisoners' Labor Union*; *Pell v. Procunier*; *Procunier v. Martinez*. We do not doubt that the rule devised by the District Court and modified by the Court of Appeals may be a reasonable way of coping with the problems of security, order, and sanitation. It simply is not, however, the only constitutionally permissible approach to these problems.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PRETRIAL DETAINEES HAVE A CONSTITUTIONAL RIGHT TO BE PRESENT DURING GENERAL SEARCHES OF THEIR CELLS

In *Wolfish*, this Court held in clear and unambiguous terms that searches conducted outside the presence of inmates, including pretrial detainees, do not violate the Fourth Amendment. 441 U.S. at 556-557. The Court further observed that, even assuming that the guards conducting the searches might on occasion damage or destroy the inmate's property, the remedy for such a due process violation is an action for damages, and not imposition of a constitutional requirement that inmates be present for the search. 441 U.S. at 557 n.38.

The district court here was presented with precisely the same constitutional claim regarding cell searches as that rejected by this Court in *Wolfish*. In reaching a contrary result, the district court asserted that, in ordering that pretrial detainees be

present during cell searches, it had accommodated security needs overlooked by the lower courts in *Wolfish* (Pet. App. 27). Second, the district court stated that it found the constitutional right to be present during cell searches to be grounded in the Due Process Clause rather than the Fourth Amendment (*id.* at 27-28). However, as the dissenting opinion in the Ninth Circuit makes clear (Pet. App. 15-17), neither of the district court's distinctions between this case and *Wolfish* survives analysis.

In fact, the district court in *Bell v. Wolfish* weighed the identical security concerns addressed by the district court here. See *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 148-149 (S.D.N.Y. 1977). The due process distinction relied upon by the courts below is equally untenable. This Court explicitly rejected a due process foundation for the right to be present during cell searches in *Wolfish*. 441 U.S. at 560-561 ("Nor do we think that the four MCC security restrictions [including cell searches] constitute 'punishment' in violation of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment."). Moreover, this Court acknowledged that, while seizures or destruction of property during cell searches might give rise to due process claims, "proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting * * * the property rights of the detainees" (441 U.S. at 557 n.38).

Where, as here, this Court has provided clear and controlling guidance as to the constitutionality of a given prison practice and corrections officials have relied on that guidance, a contrary ruling in the courts below creates substantial and unwarranted confusion. Accordingly, this Court should reverse the holding be-

low that pretrial detainees are constitutionally entitled to be present for searches of their cells.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DECEMBER 1983

No. 83-317-CFX
Status: GRANTED

Title: Sherman Block, Sheriff of the County of Los Angeles,
et al., Petitioners
v.
Dennis Rutherford, et al.

Docketed:
August 26, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Bennett, Frederick R.

Counsel for respondent: Bronstein, Alvin J.

Entry	Date	Note	Proceedings and Orders
1	Aug 26 1983	G	Petition for writ of certiorari filed.
3	Sep 20 1983		Order extending time to file response to petition until October 15, 1983.
4	Oct 17 1983	G	Motion of respondent Dennis Rutherford for leave to proceed in forma pauperis filed.
5	Oct 17 1983		Brief of respondents Dennis Rutherford, et al. in opposition filed.
6	Oct 19 1983		DISTRIBUTED. November 4, 1983
7	Nov 7 1983		Motion of respondent Dennis Rutherford for leave to proceed in forma pauperis GRANTED.
8	Nov 7 1983		Petition GRANTED. *****
9	Dec 22 1983		Brief amicus curiae of United States filed.
10	Dec 22 1983		Brief of petitioners Block, Sheriff, etc., et al. filed.
11	Dec 22 1983		Joint appendix filed.
13	Dec 30 1983		Order extending time to file brief of respondent on the merits until February 14, 1984.
14	Jan 3 1984		Record filed.
15	Jan 3 1984		Certified original record & C.A. proceedings, 5 volumes, 2 boxes, received.
16	Feb 8 1984		Brief of respondents Dennis Rutherford, et al. filed.
17	Feb 14 1984		SET FOR ARGUMENT. Wednesday, March 28, 1984. (2nd case)
18	Feb 14 1984	G	Motion of New York City Board of Correction for leave to file a brief as amicus curiae filed.
19	Feb 23 1984		Opposition of Sherman Block, et al. to motion of New York City Board of Correction for leave to file a brief as amicus curiae filed.
20	Feb 27 1984		Motion of New York City Board of Correction for leave to file a brief as amicus curiae GRANTED.
21	Feb 27 1984		CIRCULATED.
22	Mar 17 1984	X	Reply brief of petitioners Block, Sheriff, etc., et al. filed.
23	Mar 28 1984		ARGUED.